(1)

No. : 031666 MAY 13 2004

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CHRISTOPHER SLAVIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Counsel of Record
ROBERT J. DEL COL, ESQ.
Attorney for Petitioner
34 Dewey Street
Huntington, New York 11743
(631) 271-4684

DAVID BESSO, ESQ.
120 4th Avenue
Bayshore, New York 11706
(631) 666-5766

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Whether an order compelling an accused to display expressive tattoos, only relevant for their testimonial value and offered exclusively as proof of Petitioner's subjective thought process, violates the Fifth Amendment's self incrimination clause as set forth in *Holt v. U.S.*, 218 U.S. 245 (1910), *Schmerber v. California*, 382 U.S. 757 (1966) and their progeny.

2. Whether the state, by application of *U.S. v. Hubbell*, 530 U.S. 27 (2000) and its progenitors, can extort testimonial evidence directly from an accused without violating the act of production doctrine in the context of the Fifth Amendment's self incrimination clause.

3. Whether Petitioner's Fifth and Sixth Amendment privileges were violated when law enforcement forced Petitioner to strip for the purpose of obtaining testimonial evidence from him after already invoking his various Fifth Amendment privileges and Sixth Amendment right to counsel

4. Whether or not Petitioner's freestanding Fourteenth Amendment right to a fair trial was violated in this case

TABLE OF CONTENTS

Pages

Questions Presented i

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Requested Writ 7

I. The New York Court of Appeals has created a genuine constitutional conflict 7

II. The issue has been fully debated and is ripe for review 17

III. This case concerns fundamental constitutional protections 30

Conclusion 30

CASES CITED

Bellis v. U.S., 417 U.S. 85 (1974) 17, 23

Boyd v. U.S., 116 U.S. 616 (1865) 16, 17

Braswell v. U.S., 487 U.S. 99 (1988) 18, 22

Brown v. Walker, 161 U.S. 591 28

California v. Byers, 402 U.S. 424 (1971) 14, 23

Chapman v. California, 386 U.S. 18 (1967) 29

Cohens v. Commonwealth of Virginia, 6 Wheat 264 (1821) 28

Couch v. U.S., 409 U.S. 322, 342 (1973) 7, 10, 22, 25

Counselman v. Hitchcock, 142 U.S. 547 (1896) 7, 22

Curcio v. U.S., 354 U.S. 118 (1957) 9, 17

Dawson v. Delaware, 503 U.S. 159 (1992) 26

Doe v. U.S., 487 U.S. 201 (1988) 9, 11, 13, 14, 17, 18, 22, 25, 27

Estelle v. Smith, 451 U.S. 454 (1981) 26

Fisher v. U.S., 425 U.S. 391 (1976) . . . 17, 18, 20, 21, 22, 27

Holt v. U.S., 218 U.S. 245 (1910) ..... i, 4, 6, 12, 13, 16, 17, 23

Kastigar v. U.S., 406 U.S. 441 (1972) 17

Miranda v. Arizona, 384 U.S. 436 (1966) 26, 27

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 23

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 7, 13

Schmerber v. California, 382 U.S. 757 (1966) ..... i, 3, 4, 6, 9, 11, 12, 16, 17, 20, 22, 27,

Ullman v. U.S., 350 U.S. 423 (1956) 5

U.S. v. Dionisio, 410 U.S. 1, (1973) 13

U.S.. v. Gilbert, 388 U.S. 288 (1967) 3, 4, 6, 11, 16, 22

U.S. v. Henry, 447 U.S. 264 (1980) 28

U.S. v. Hubbell, 530 U.S. 27 (2000) ..... i, 5, 6, 7, 15, 16, 17, 20, 22, 27

U.S. v. Shapiro, 355 U.S. 1 (1948) 17

U.S. v. Wade, 388 U.S. 218 (1969) 3, 4, 6, 11, 13, 16, 19, 22, 23

APPENDICES

Appendix A - New York State Court of Appeals
Decision 2/17/04 ..... 1a

Appendix B- C.P.L. 240.40(2)(b)(iv) 16a

Appendix C - Supreme Court of the State of New York,
County of Suffolk, Order Pursuant to
CPL 240.40(2)(b)(v) 18a

Appendix D - County Court of the State of New York,
County of Suffolk, Decision of 2/26/01 ..... 20a

Appendix E - County Court of the State of New York,
County of Suffolk, In Limine Ruling 9/10/01 ..... 31a

Appendix F - Supreme Court of the State of New York,
Appellate Division, Second Department,
Decision 11/18/02 ..... 34a

Appendix G - State of New York, Court of Appeals,
Order Granting Leave to Appeal 6/11/03 ..... 36a

Appendix H - Excerpts from Trial Transcript 38a

OPINIONS BELOW

The Opinion delivered by the New York Court of Appeals (Pet. App. 1a-15a) is reported at *People v. Slavin*, 1 N.Y.3d 392 (Ct. App. 2004) , WL 305600 (Ct. App. 2004).

The opinion of the intermediate appellate Court (Pet. App. 34a-35a) is reported at *People v. Slavin*, 299 A.D.2d 499, 749 N.Y.S.2d 738 (App. Div. 2nd Dept. 2003). The pertinent Trial Court decisions were unreported and are annexed hereto (Pet. App.18a-33a).

STATEMENT OF JURISDICTION

The New York Court of Appeals entered its order on February 17, 2004.

STATUTORY PROVISIONS INVOLVED

The provision of the New York Criminal Procedure Law [N.Y.C.P.L. 240.40 (2) (b) (iv)] relevant to this Petition is reprinted in the appendix (Pet. App.16a-17a)

STATEMENT OF THE CASE

The constitutional questions presented to this Court emanate from a relatively simple set of undisputed facts.

On November 2, 2000, the Petitioner, accompanied by Counsel, presented himself to the office of the District Attorney for the County of Suffolk, State of New York. He was immediately arrested for his role in an assault that occurred on September 17, 2000 in Farmingville, a suburb in Suffolk County, New York. At the time Petitioner was delivered over to the authorities, no warrant had been issued for his arrest nor had an indictment been handed up by a Grand Jury.

Importantly, prior to actually presenting Petitioner to the office of the District Attorney, retained Counsel advised the authorities, in writing, that the accused was invoking his

various Fifth Amendment privileges. Thereafter, while at the office of the District Attorney, defense counsel expressly rejected requests by the Prosecutrix for what are, in New York, commonly referred to as "voluntary exemplars", specifically, photographs of petitioner's body which had affixed thereon, by way of tattooing, images, acronyms and symbols. During this introductory stage of the proceeding two requests made by the prosecutrix for "voluntary exemplars" were unequivocally denied by defense counsel. Moreover, on each occasion the authorities were advised that the gathering of any corporeal evidence would only be permitted by application of, and in accordance with, New York Criminal Procedure Law 240.40 (2) (b) (iv), New York State's Corporeal Evidence Statute.[1]

However, despite these admonitions, Petitioner, after the departure of Counsel, was forced to strip and have his body repeatedly photographed.[2]

In reaction to Petitioner's threshold Fourth, Fifth and Sixth Amendment challenges to this unlawful gathering of evidence, the People moved, pursuant to the corporeal evidence statute, for an order that would require Petitioner to remove his clothing for the purpose of photographing the expressive tattoos appearing on his stomach, chest, upper arms and legs, all shielded from public view by ordinary, every day attire.

Petitioner opposed the People's motion and raised, *inter alia*, the Fifth Amendment's self-incrimination clause as a

---

[1] N.Y.C. P.L. 240.40 (2)(b)(iv) provides, "subject to constitutional limitation" the people may obtain, pursuant to order, "non-testimonial evidence." Pet. App. 16a-17a.

[2] Like the lower Court's dissent, Petitioner contends the forced strip of petitioner constituted the coerced gathering of testimonial evidence, obtained after the entry of counsel, not a routine booking procedure. Pet. App. 13a-14a.

defense to the forced exhibition of the tattoos, some of which were undeniably anti-Semitic, while others could be considered "white supremacist" and still others evince a counter culture lifestyle and disdain for the police. The Trial Court granted the People's application and, pursuant to court order, a second set of photos were taken and ultimately introduced against Petitioner at his criminal trial. Pet. App. 18a-19a.

Critical to Petitioner's Fifth Amendment reasoning are two uncontroverted facts. First, no witness to the crimes alleged observed the tattoos in question and their existence was irrelevant and immaterial, as a matter of fact and law, *vis a vis* identification, appearance or physical condition of the accused. Second, the evidence was sought, and later admitted at Petitioner's criminal trial, for its testimonial value, in a communicative context and for the sole purpose of proving to the jury Petitioner's subjective thought process on the issues of race and religion. Petitioner contends that under these novel and unique circumstances, the State, by forcing the Petitioner to reveal the tattoos for the singular purpose of establishing his thoughts and beliefs, violated Petitioner's Fifth Amendment privilege against self-incrimination.

As is more fully discussed hereinafter, Petitioner, relying on *Schmerber v. California*, 382 U.S. 757 (1966), *U.S. v. Gilbert*, 388 U.S. 288 (1967), and *U.S. v. Wade*, 388 U.S. 218 (1969), advanced the contention that since the evidence, obtained by coercive judicial edict, was neither sought nor introduced to establish an empirical fact, physiological response or identity, but rather, obtained and admitted into evidence for the stated purpose of establishing Petitioner's thoughts and beliefs, the Fifth Amendment privilege, unlike other corporeal evidence cases, was implicated.

Petitioner readily concedes that typically, corporeal evidence is, almost by definition, non-testimonial. However,

as seen here, and considering that people are not born tattooed, this presumption is not an absolute. It was, until this case, axiomatic that corporeal evidence is constitutionally obtainable and admissible so long as it relates to the proof of an empirical fact such as identity, physical appearance or to establish a physiological response. *Holt v. U.S.*, 218 U.S. 245, 252, 253 (1910). Free from the risk that the accused's thoughts or beliefs will, by State action, be compelled from him and remain his own, traditional corporeal and forensic evidence is essential to modern day prosecutions and, as this Court reasoned in *Schmerber, supra, "that since blood evidence was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, the privilege was not implicated", Id.* 765.

At trial, and before the intermediate Appellate Court, the people relied on an exceedingly narrow reading of *Schmerber* to justify the issuance of an order that compelled Petitioner to reveal the tattoos, enabling them to be photographed and subsequently admitted into evidence against Petitioner as proof of his subjective thoughts and motive. The Trial Court also adopted this narrow view when it refused to acknowledge the testimonial nature of the evidence. Pet. App. 25a-16a, 29a, 32a. The intermediate Appellate Court passed on the issue without comment. Pet. App.34a-35.

On June 11, 2003, Chief Judge Judith Kaye granted leave to argue the matter before the New York Court of Appeals. Pet App.36a-37a.

In his brief to the New York Court of Appeals, Petitioner, still guided by the holdings of *Schmerber, Gilbert and Wade,* asserted that since the evidence was obtained and offered to establish Petitioner's philosophic leanings, ideology and motive for having committed the crimes charged, as opposed to empirical fact, physiological response or identity,

the evidence itself constituted a departure from the realm of corporeal evidence and entered that which is testimonial and communicative, something jealously guarded by the Fifth Amendment's self-incrimination clause. *Ullman v. U.S.*, 350 U.S. 423, 426, 428 (1956).

In their brief to the New York Court of Appeals, the People responded that, since the State did not compel Petitioner to inscribe himself, the holding of *U.S. v. Hubbell*, 530 U.S. 27 (2000), and document related cases like it, were controlling and analogous. The People also contended that, since the tattoos pre-existed, by many years, the order requiring them to be displayed, "act of production doctrine" considerations were not violated. Petitioner disagreed, arguing that the compelled exhibition of the tattoos evinced a reaffirmance of their socio-racial and political overtones and that, since it was Petitioner's own body, not a document whose source could be hidden from a jury, the compelled display was, in the context of the self incrimination clause, an independent and coerced testimonial act. Petitioner also contended that, since it was only by court order that the evidence (the photos) was created, that Petitioner, even under a *Hubbell* approach, was forced to assist in the creation of evidence as opposed to the mere surrender of evidence. Pointing to the obvious distinction between delivering a pre-existing document pursuant to subpoena and the patent invasion of personal privacy that accompanies the forced stripping of an accused for the purpose of taking photographs of his or her body, Petitioner claimed this Court ordered procedure violated a host of constitutional and evidentiary considerations. Finally, Petitioner asserted that in the context of the case, the photos, being of Petitioner, required him to self authenticate the tattoos and, most importantly, affirm and restate what they were purported to represent.

In a four-two decision rendered on February 17, 2004, a divided New York Court of Appeals adopted the People's

view, holding that despite being irrelevant and immaterial as corporeal evidence and while acknowledging the testimonial qualities and communicative nature of the evidence, the State, by application of *Hubbell* and its progenitors, was entitled to constrain Petitioner to remove his clothing, display the tattoos, be photographed, and have the photos admitted into evidence to establish his thoughts and beliefs on the issue of race and motive for committing the crimes charged.[3] Pet. App. 1a-9a.

In a sharply worded dissent, Judge Ciparick, joined by Chief Judge Kaye, called the majority's *Hubbell* analogy "*Dubious, at best.*" Petitioner agrees.

There are no facts better suited to a discussion concerning the scope and breadth of the privilege than are presented here. The existence of a New York Court of Appeals decision that expands the holding of *Hubbell* to the extent that it eclipses the rationale set forth in *Schmerber* and its progeny, creates a significant constitutional conflict. It is respectfully requested that the Court avail itself of this opportunity to further define the privilege and realign the apparent incongruity between corporeal and incorporeal evidence created by the New York's highest Court.

The novel and unique facts of this case, wherein evidence, constitutionally limited to establish empirical facts such as identity, [*U.S.v. Wade*, 388 U.S. 218 (1967), *Gilbert v.*

---

[3] Aside from the tattoo photos and testimony directly relating thereto, the record is barren of any evidence supporting the conclusion that the crimes charged were race, gang, white supremacist or hate group related or that the crimes were contrivances emanating from having such beliefs or membership in such groups. Yet, despite this being so, the tattoos were employed to create the inference that Petitioner belonged to such groups as "prison gangs", "street gangs", white supremacist groups and worse. Most importantly however, the evidence was used as evidence of Petitioners subjective thoughts and to supply a racial motive to the crimes charged. Pet. App.38-64a (See also Pet. App. 17a).

California, 388 U.S. 263 (1967)], physiological responses [*Schmerber v. California*, 384 U.S. 757 (1967)] and appearance [*Holt v. U.S.*, 218 U.S. 245 (1950)], is extracted by court order for the sole and singular purpose of establishing an accused's subjective thought process permits, even invites, a thorough re-examination of the Fifth Amendment's self-incrimination clause. As this is a case of first impression, it is appropriate and warranted for this Court to have the final word on the matter.

REASONS FOR GRANTING THE REQUESTED WRIT

I. The New York Court of Appeals has created a genuine constitutional conflict.

The Fifth Amendment provides *"No person shall be compelled in any criminal case to be a witness against himself."* Historically, this Court has surveyed the boundaries of the privilege and bench marked its dimensions by the "*testimonial character*" and "*communicative and personal nature*" of the disputed evidence that, when combined with the "*ingredient of personal compulsion*", provides the longitude and latitude necessary to navigate the course originally plotted by the framers. *Counselman v. Hitchcock*, 142 U.S. 547 (1896).

In the matter being considered, by misapplication of this Court's determination in *Hubbell*, *supra*, the New York Court of Appeals has blurred, even erased altogether, the line that once separated corporeal and incorporeal evidence. Petitioner contends that this stealthy transgression, and degradation of the privilege, only serves to encourage the government's "*ever more ingenious methods of obtaining access to sought after materials*", and cannot withstand critical, historical, philosophic or even logical scrutiny. *Couch v. U.S.*, 409 U.S. 322, 342 (1973), *U.S. v. White*, 322 U.S. 695, 698, 699 (1944).

Undoubtedly, the burning question presented (which parenthetically, neatly fits the criteria of Justices Thomas' and Scalia's invitation appearing in their appended opinion in *Hubbell*, *supra* and that which appeared in Justice Marshall's dissent in *Pennsylvania V. Muniz*, *infra* at fn 4) is whether the Fifth Amendment privilege protects against compelled production (or creation) of incriminating evidence or, is it wholly exclusive to that which is testimonial and, if not, under what authority can the State extort evidence, testimonial or otherwise, directly from the accused and still remain within the recognized purpose and policy behind the privilege.

This case seeks an answer to both questions. Moreover, the salient facts of this case, simple as they are, provide fertile ground for discussion and a forum that could potentially resolve ancient questions concerning the Fifth Amendment's self incrimination clause. While there is no doubt that the facts presented reveal the challenging and enigmatic nature of the privilege, the questions raised by the New York Court of Appeals linger and now require a definitive answer.

* * *

Admittedly, the thorniest question that must be answered by this Court is to define the type of evidence created when the trial Court, via coercive judicial edict, ordered the Petitioner to disrobe and be photographed.

Perhaps, the simple answer is corporeal evidence. However, in this extraordinary case, the simple approach reaches the wrong conclusion. Here, the constitutional axiom that the evidence relate to some empirical consideration, i.e. identity, appearance or physical condition, is absent. In this case the evidence was sought, and obtained by coercive judicial edict, for the singular purpose of compelling from the accused his thoughts and beliefs as reflected in the expressive tattoos found on his body. Importantly, the evidence was obtained,

and later admitted at trial, as proof of Petitioner's "thinking"[4] not as "real" or "physical evidence". Moreover, there is no doubt that what was obtained from Petitioner is most accurately described as "*testimonial evidence*", offered to the jury in a communicative context, for the imprecise, but intended purpose of establishing Petitioner's subjective thoughts, beliefs and motive. *Doe v. U.S.*, 487 U.S. 201, 210, (1988), *Curcio v.U.S.*, 354 U.S.118, 128 (1957). The problem is, the evidence was obtained by virtue of New York's corporeal evidence statute and this Court's well defined corporeal evidence exception. This dilemma cannot be logically reconciled and the approach taken constitutes the forced fitting of a square peg into a round hole.

In *Schmerber v. California*, *supra*, this Court, while addressing the Fourth and Fifth Amendment implications emanating from the issue of corporeal evidence, concluded that "*the privilege of self incrimination protects an accused only from being compelled to testify, or from otherwise providing the state with evidence of a testimonial or communicative nature*" *Id.* 764. The Court likewise concluded "*It is clear that the protection reaches an accused's communications, whatever form they might take, and the compulsion or responses which are also communication*" and, so long as there does not exist "*even the shadow of testimonial compulsion*" the privilege is not triggered. (emphasis added) *Id.* 764-766.

In this case, the Trial Court ordered an accused to provide testimonial evidence that was subsequently offered for its communicative value, absent the justification or requiring

---

[4] In her opening statement to the jury the prosecutrix tells the jury that, "although the tattoos may not identify him (Petitioner) as a perpetrator. And while they will never offer an explanation to you about why anyone would do this, they will provide some insight to his motive, as to his thinking." This is her only reference to the tattoos in her opening statement.

the evidence speak to any corporeal issue whatsoever. Moreover, since the evidence itself was utterly immaterial and irrelevant as traditional exemplars, its relevance and materiality was limited by the facts to incorporeal matters, such as thought and belief. As opposed to the mere exhibition of his person for identification purposes, in this case, the Trial Court forced the accused to reveal his person so that communicative and testimonial evidence could be obtained directly from him and, to some extent, as the byproduct of a coercive judicial edict, be created by him. And, although requested and obtained under the guise of corporeal evidence, what was actually obtained were insights into the purported "*inner sanctum of personal feeling and thought*" [Couch v. U.S., 409 U.S. 322, 377(1973)] and as such should have been protected. That much is clear.

To put a finer point on Petitioner's initial Fifth Amendment claim, the Court should note that, aside from the images and symbols referred to by the majority below, at least three of the tattoos in question, "F.T.W.", "A.C.A.B." and "N.Y.H.C.", are acronyms for actual words and expressive thought. What is most troubling however, is that the Trial Court, after the photos were admitted into evidence, permitted the State to present testimony as to the meaning of these acronyms[5]. Ignoring, for the moment, the danger that exists when law enforcement is left to speculate or select what words are to be put into the mouth of an accused in a criminal trial, the fact remains that actual words were attributed to the Petitioner and those words were obtained, by force, *via* coercive judicial edict. The Fifth and Sixth Amendment implications that resonate from this scenario are virtually

---

[5] F.T.W. was, at Petitioner's trial, said to mean "Fuck the World" while A.C.A.B. stood for "All cops are bastards." N.Y.H.C. was said to indicate an association with a group known as "New York Hate Corps." or "New York Hard Core". See Pet. App. 59a-60a.

endless.

* * *

In each of the seminal cases decided by this Court dealing with the accused's compulsory submission to exemplar orders, this Court reiterates the sentiment that "*mere exemplars, in contrast to the content of what is said*", are nothing more than "*identifying physical characteristics.*" Doe v. U.S, 487 U.S 201, 210, 211 (1988), U.S v. Wade, 388 U.S. 218, 222 (1967). It is readily apparent that this Court, when choosing to frame underlying rationale behind the corporeal evidence exception in the context of "*identifying physical characteristics*", intended any search or forced exhibition to be related, at least in some measure, to an identification, empirical or corporeal matter in controversy. For instance, in U.S. v. Wade, *supra*, the Court reiterates itself by opining "*the accused was required to use his voice as an identifying physical characteristic, not to speak his guilt.*" *Id.* 222-223. Here, there was no nexus between the forced exhibition of the body and a related question of empirical fact. It was, as a matter of record, made clear that this evidence was only relevant to establish the Petitioner's subjective thoughts and beliefs. These two propositions cannot, even theoretically, be squared. Here, the evidence was, by the State's own admission, sought after to establish the accused's "*self-identification with white supremacist ideology*", to establish Petitioner's "*general racial animosity*" or, as told to the jury by the prosecutrix, to establish Petitioner's "*thinking*". It was reasoned by the People that, once Petitioner's religious, socio-racial and political beliefs were established, the jury would infer a racist motive to the crimes charged. By advancing the contention that anyone who has inscribed himself with these symbols of hatred possessed the requisite mental state to commit murder, the People used the evidence obtained, not to establish guilt as an empirical matter but rather, as a subjective admission, or as this Court has

phrased it, to "*speak his own guilt*" U.S. v. Wade, 388 U.S. at 223. Petitioner asserts that this scenario cast the "*shadow of testimonial compulsion*" specifically warned against in Schmerber v. California, 382 U.S. at 765.

In U.S. v.Gilbert, 388 U.S. 263, 265 (1967), this Court presaged the problems we have now encountered. When discussing the justification behind excepting corporeal evidence from Constitutional protection, Justice Brennan notes that "*no claim is made that the content of the exemplars was testimonial*", suggesting that the absence of such a claim, and the close relationship of the evidence to an empirical fact in issue, was dispositive. Likewise, in Schmerber, *supra,* Justice Brennan predicted potential conflicts by pointing out that the distinction between corporeal and testimonial evidence may, at some future time, begin to blend and that "*there will be many cases in which such a distinction is not readily drawn.*" *Id.* 764. Here, Petitioner has fully asserted the claim that is absent in all other exemplar cases ever to appear before this Court. It is abundantly clear that by application of the well defined rationale expressed in Schmerber, *supra*, and every other exemplar or corporeal evidence case decided by this Court, the order compelling Petitioner to provide this evidence should be construed to be a violation of the privilege. This fundamental distinction was, and continues to be, disregarded by New York's highest Court.

The next question to be addressed is whether compelling Petitioner to reveal, under the guise of the corporeal evidence exception, the expressive tattoos, the Trial Court "*extorted a communication*" from Petitioner. Guidance on this question can be found in this Court's holding in Holt v. U.S., 218 U.S. 245, 252-253 (1910), wherein the Court ruled

> "*...but the prohibition of compelling a man in a criminal Court to be a witness against himself is a*

prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."(emphasis added).

In *Holt*, the exhibition of the Petitioner's body was inextricably intertwined with the legitimate use of corporeal evidence, not to establish the accused's subjective thoughts and beliefs. Moreover, it cannot be logically or constitutionally maintained that materiality under *Holt*, or any other corporeal evidence case for that matter, emanate from a prohibited source such as the State's desire to establish an accused's subjective thoughts or beliefs. It is submitted that, while partially relying on *Holt*, the majority below has failed to recognize this distinction and misapprehended this Court's long-standing rationale which distinguishes "*real or physical evidence*" from that which is "*communicative or testimonial.*" It was only through an exercise in circular reasoning that the majority below was able to somehow justify its conclusion that it is constitutionally permissible to obtain "*testimonial*" evidence, necessary to prove an incorporeal matter, by employing the corporeal evidence exception as justification for its forcible extraction. Aside from not making sense, this approach violates both the spirit and history of the privilege.

In all of this Court's prior determinations, the corporeal evidence exception has been restricted to those times when the physical characteristics of an accused are material and relevant to just that, the accused's physical person. Whether it be a physiological response like drunkenness or dexterity [*Pennsylvania v. Muniz*, 496 U.S.582 (1990)] or size, [*Holt v. U.S*, *supra*], sound of voice, [*U.S. v. Dionisio*, 410 U.S.1, (1973)], or actual identity, [*U.S. v.Wade*, *supra*], the relevancy and materiality of the evidence has always been limited to "*the*

mere exhibition of a physical characteristic *for identification purposes*", and therefore the privilege was not touched. (emphasis added) *Doe v. U.S.*, 487 U.S. at 210, 211.

This case represents a radical departure from this well settled precept and impermissibly expands the State's ability to extort testimonial evidence, by judicial edict, directly from an accused, a proposition that is anti-thetical to the Fifth Amendment's self-incrimination clause.

The fact that New York State's highest Court has promulgated a rule of law that permits the forcible extraction of testimonial evidence directly from the natural person of the accused is reason enough to grant this petition.

* * *

In order to avoid these readily apparent, logically consistent and straightforward arguments, the People raised the larger question that now looms before this Court, to wit: respecting the historic and philosophic genesis of the privilege, can the State compel testimonial evidence directly from the accused and use it against him or her in a criminal trial?

There is no doubt that the evidence obtained from Petitioner was communicative and testimonial as the term has been defined by this Court. In *Doe v. U.S.*, 487 U.S. 201, 210 (1988) this Court defined testimonial evidence as that which "*reveals a person's subjective knowledge or thought process and that the privilege, at least in part, was designed to spare an accused from...having to share his thoughts and beliefs with the government. Id.* 213, or evidence that "*explicitly or implicitly relates a factual assertion, discloses information or that which reveals the operations of the mind.*" *Id.* 210, 211. When discussing this issue the Court has also alluded to the communicative context in which the evidence is presented. Petitioner contends that this Court's contextual concerns mirror those of Petitioner insofar as the relevancy and materiality of

the evidence. Very simply, evidence that is offered in a communicative context is that which is submitted to establish a thought or belief as opposed to an empirical fact or corporeal matter. *California v.Byers*, 402 U.S. 424, 456, 436 (1971).

Taken together, "*testimonial evidence*" offered in a "*communicative context*"would therefor, under the corporeal evidence exception, violate the privilege. This well settled constitutional syllogism has been ignored by the New York Court of Appeals.

Importantly, in this case, the New York Court of Appeals recognized the evidence to be testimonial in nature and offered in a communicative context, but then turned to *Hubbell, supra,* to excuse the State's actions, avoid suppression and circumvent the privilege. This is the crux of the conflict.

Here, despite finding the evidence to be testimonial and communicative, the New York Court of Appeals reasoned "*the issue thus becomes whether the privilege is implicated here because this particular "real or physical evidence" may have also reflected Defendant's thought process. In this regard, we consider it dispositive that there is no Fifth Amendment protection for the contents of preexisting documents. Indeed, it is a settled proposition that a person may be required to produce specific documents (in response to a subpoena) even though they contain incriminating assertions of fact or belief because the creation of those documents was not compelled within the meaning of the privilege. United States v.Hubbell, 530 U.S. at 35-36."* Pet App. 6a-7a.

Petitioner's contention, that the Lower Court's view of *Hubbell* impermissibly decreased the Fifth Amendment's self-incrimination clause rests, in part, on the assertion that, once offered for the sole and particular purpose of proving the accused's subjective thoughts and beliefs, the evidence ceased to be *"real or physical"* evidence and was transmuted by its

use, relevancy and materiality into "*testimonial evidence.*" Petitioner hastens to point out and emphasizes that, since the tattoos were never relevant or material to any corporeal matter, the corporeal evidence justification underlying the Trial Court's order that permitted the forced gathering of it was never constitutionally authorized. Accordingly, Petitioner contends that the New York Court of Appeals' entire paradigm is conceptually flawed, ill conceived and unconstitutional.

From as early as *Boyd v. U.S., 116 U.S. 616, 635 (1865)* this court has repeatedly warned *"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that illegitimate and unconstitutional practices get their first footing...by silent approaches and slight deviations from legal modes and procedure."* This case demonstrates the ease and stealth by which recognized liberties can be shrewdly dispensed with.

In their brief to the New York Court of Appeals, the People introduced the "act of production doctrine" by equating the Petitioner's body to a pre-existing subpoenaed record or document. This assertion, while acknowledging the testimonial nature of the evidence, muddled an already murky question resulting in the awkward reasoning appearing in the lower Court's majority opinion.

Ignoring for the moment the fact that the questioned evidence was obtained by employing this Court's corporeal evidence exception, the cases relied on by the People and the Court below are inapposite to the question presented and the facts of this case. Petitioner contends that by contorting *Hubbell* , the New York Court of Appeals has decreased the privilege as it applies to the natural individual and violates the edict of *Holt, Schmerber, Gilbert,* and *Wade.*

II The issue has been fully debated and is ripe for review.

The existence of a New York Court of Appeals decision which expands *Hubbell* and its progenitors to an extent where they converge upon *Holt* and its progeny, has precipitated a genuine constitutional conflict that should now be settled. These issues are fully effaced and ripe for consideration.

* * *

Initially, Petitioner notes that the analogy drawn by the majority below is without precedent. Never before has the rationale employed by this Court in *Hubbell* been applied to the physical person or natural individual, so as to permit the coerced extraction of testimonial evidence directly from one accused of a crime. Petitioner contends the opinion below sets a dangerous precedent, one that is entirely inconsistent with any previous interpretation of *Schmerber*, *Hubbell*, or the Fifth Amendment for that matter. Petitioner likewise contends that even if this Court was to accept the reasoning employed by the New York Court of Appeals, effectively reducing the individual to the status of subpoenaed business records or tax returns, even then, and by properly applying the doctrine, the evidence would still remain Fifth Amendment protected.

Since the time of *Boyd v. U.S*, 116 U.S. 616 (1886) continuing through *U.S v. Shapiro*, 355 U.S.1 (1948), *Curcio v. U.S.*, 354 U.S. 118 (1957), *Kastigar v. U.S*, 406 U.S 441 (1972), *Bellis v. U.S.*, 417 U.S. 85 (1974) and culminating in *Fisher v. U.S.*, 425 U.S. 391 (1976), *Doe v. U.S.*, 487 U.S. 201 (1988) and *U.S. v. Hubbell*, 530 U.S. 27 (2000), this Court has sought to define the language appearing in the Fifth Amendment's self incrimination clause which protects the citizenry against being incriminated by their own compelled testimonial communications. A review of this Court's opinions leading up to *Hubbell* results in the following theoretical

amalgam which captures the essence of the privilege and the act of production doctrine:

> *"It is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind that implicates the self incrimination clause and unless some attempt is made to secure a communication, written or oral or otherwise upon which reliance is to be placed as involving the accused consciousness of the facts and the operations of his mind in expressing it, the demand is not a testimonial one."*(Citations omitted). Doe v. U.S., 487 U.S. 201, 211 (1988).

By application of this standard, and remembering the photos were of the Petitioner himself not documents relating to some artificial entity, triggering the privilege is logically unavoidable. *Braswell v. U.S.*, 487 U.S. 99, 117, 118 (1988).

Until now, this debate has been limited to those times when the government, by use of a subpoena, has sought records and other documents that, while containing incriminating evidence, did not compel the individual to restate, repeat or affirm the truth of the contents or authenticity of the documents sought and therefore, the Fifth Amendment was not violated *"for the privilege protects a person only against being incriminated by his own compelled testimonial communications"*. Fisher v. U.S., 425 U.S 391, 407 (1976).

In the case submitted for consideration, there are two views supporting the Petitioner's contention regarding the act of production doctrine's applicability to this matter. First, by compelling the Petitioner to disrobe for the purpose of creating testimonial evidence (the photos), the Trial Court forced Petitioner to do more then deliver evidence, it forced him to participate in the creation of evidence. These photos, taken over objection and under the threat of force, were only realized

by a coercive edict that required Petitioner to strip for this purpose and this purpose alone. Taken together with the fact that the images, symbols and words appearing on the Petitioner's body are, as the term was defined in Doe, *supra* testimonial, the process described constitutes the creation, and extortion, of testimonial evidence. As for their use, there is no question that the photos were offered for their testimonial value and in a communicative context as opposed to a "*mere physical characteristic for identification purposes*". U.S. v. Wade, *supra* at 222.

The second view is, by compelling the Petitioner to reveal the expressive tattoos, the Trial Court forced Petitioner to restate, repeat and affirm their purported sentiments. Since the evidence was admitted at Petitioner's trial for the sole purpose of establishing his current beliefs, the forced display of the tattoos, which had been affixed years earlier, were of unknown vintage and hidden from public view, served as an affirmance, or restatement of their contents on both the day the photos were taken and when they were introduced against Petitioner at trial. Moreover, they were, as a matter of record, introduced for that precise purpose, to attribute the sentiments expressed in the tattoos to the Petitioner, at trial. Likewise, Petitioner contends that under these facts there is no way to divorce his testimonial capacities from either the gathering of the evidence or its contents. The mere fact that the evidence was introduced for the sole purpose of attributing to Petitioner the beliefs reflected in the tattoos to Petitioner, renders the forced display of them, at several levels, a coerced assertion of fact or belief. Here, the photos were of the accused himself, making the testimonial compulsion self-evident and the only difference between what happened here and the forced stripping of the accused in open Court, is an imagined one. No distinction can be made between forcing the accused to orally restate a coerced confession in open Court and the facts of this

case. This, Petitioner contends, presents the substantial threat of self incrimination necessary to activate the privilege.

By holding that "However much the tattoos may have reflected the Defendant's *inner thoughts, the people did not compel him to create them*," Pet. App. 1a the lower Court acknowledges the testimonial nature of the evidence but circumvents the privilege as set forth in *Schmerber* by misapplying the act of production doctrine as restated in *Hubbell*. However, unlike the cases relied upon by the Court below, here, the Petitioner provided much more than a mere concession that the tattoos existed, he was forced to reaffirm and restate their contents by removing his clothing and displaying himself for the photographer. This dangerous precedent defies this Court's belief that *"It is the extortion of information from the accused himself that offends our sense of justice."* *Fisher v. U.S.*, 425 U.S. 391, 398 (1976).

At the New York Court of Appeals the People also contended (and the majority agreed) that the tattoos constituted a "prior statement" made at the time a particular tattoo was affixed. Petitioner answered that considering their age, location (intimate parts of the body), and the fact that they were covered by clothing and hidden from public view, the judicially coerced removal of the clothing which hides them, constituted an independent compelled testimonial act. These facts, standing alone, deliver all that is necessary to implicate the privilege and overwhelm the State's anemic view of the doctrine upon which they rely.

In *Fisher, supra* this Court noted that: "*the elements of compulsion are clearly present, but the more difficult issues are whether tacit averments of the taxpayer are both testimonial and incriminating for the purpose of applying the Fifth Amendment.*" Importantly, the Court continued "*these questions perhaps do not lend themselves to categorical*

answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." Id 410. In this case, the purpose behind the compelled display was to ascribe a current testimonial statement to the Petitioner at trial, thereby violating the underlying principles that support the act of production doctrine as well as the Fifth Amendment's self-incrimination clause. It is submitted that, considering the age, location, and content of the images, acronyms and symbols, their display constituted a forced and explicit testimonial act, not a harmless or tacit averment as to whether or not they exist. *Fisher v. U.S.*, 425 U.S. at 410, 411.

Under these facts, the compelled display of Petitioner's body in order to provide testimonial evidence violated the privilege under *Schmerber* and the act of production doctrine as set forth in *Hubbell*.

* * *

A related proposition that deserves attention is this Court's repeated affirmation that, "*one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy.*" *Fisher v. U.S, supra* at 399.

The rationale employed by the New York Court of Appeals, which equates the stripping and photographing of the individual with a corporate document or business record obtained by subpoena, not only decreases the sanctity of the privilege but also the individual. The authority is legion that distinguishes the *person* of the accused and the workings of his mind from his papers and records. For instance in *U.S. v. White*, 322 U.S. at 648, this Court declared "*The privilege is a personal one... applying to natural individuals designed to prevent legal process from forcing from the accused evidence necessary to convict him or compelling him to authenticate documents or effects that might incriminate him",* and that

these principles construct a barrier against *"physical torture and less reprehensible modes of compelling evidence"* and form a *"bulwark against inquisitous methods of prosecution."* The lower Court's opinion abandons this fundamental concept.

In the view of the New York Court of Appeals, the State, by the issuance of a simple subpoena *deuces tecum*, can now, without exception or immunity, forcibly extract testimonial evidence directly from one accused of a crime. This is the bottom of the slippery slope. What is seen here is the People's successful attempt to avoid the strict standards of *Schmerber/ Gilbert/ Wade* by employing the relaxed standard expressed in *Hubbell and Fisher*, which was only accomplished by reducing the natural individual to the status of a business record or other inanimate object. It is submitted that the mere existence of a rule that is particular to records and documents should be recognition enough of the distinction between *people,* and the documents they, or others, may possess. The lower Courts opinion fails to account for this historical distinction and reveals a failed experiment that crossbred *Schmerber* and *Hubbell* to the detriment of the privilege and the sanctity of the individual. *Braswell v. U.S.*, 487 U.S 99, 117, 118 (1988).

Even in cases that concerned the delivery of documents, this Court has gone to great lengths to reaffirm the importance of preserving "*inviolate the privilege against compulsory self incrimination"* by declaring the privilege *"an intimate and personal one which respects the private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self condemnation."* *Couch v. U.S*, 409 U.S. 322, 327-329 (1975), *Doe v. U.S.*, 487 U.S. 201, 210-215 (1988).

Recognizing the abhorrence of governmental assaults upon the *individual*, this Court has often warned against the temptation to resort to the "*cruel expedient of compelling*

incriminating evidence" [Couch v. U.S., *supra*, U.S v. White, 322 U.S. 684, 698 (1944)], and that the privilege "*is as broad as the mischief against which it seeks to guard.*" Schmerber v. California, 354 U.S. 757, 764 (1966), citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). The mischief that is invited by the lower Court's decision is, in a constitutional context, deeply disturbing and rife with the danger of governmental and prosecutorial abuse.

Moreover, any view of these undisputed facts discloses that this Petitioner was also subjected to the *"cruel trilemma of self accusation, perjury, or contempt"*, Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55-57 (1964). When faced with a court order, one disingenuously cloaked and disguised as an exemplar order, Petitioner was confronted with the choice of either complying with the edict, being subject to physical force, or jailed for contempt.[6] Pet. App.18a-19a. There can be no justice obtained from such a scenario, for the privilege, in full vigor, prohibits the "*use of physical or moral compulsion to extort communications from him*". Holt v. U.S., 218 U.S. at 252-253 (1910).

Likewise, this Court has repeatedly warned of "*stealthy encroachments*" and attempts by the government to employ legal process to "*force from the lips of the accused individual the evidence necessary to convict him or force him to produce and authenticate any personal documents or effects that might incriminate himself.*" Bellis v. U.S, 417 U.S. 85, 88 (1974). U.S. v. White, 322 U.S. 694 (1944). It is submitted that in this case, the historic function of protecting the "*natural individual from compulsory incrimination*" has not been observed. California v. Byers, 402 U.S. 424, 450 (1971). The syllogism employed by the majority in the Court below is deeply flawed and appears to

---

[6] Petitioner was free on bail when ordered to pose for the second set of photographs.

be nothing more than a rationalization intended to diminish the privilege as opposed to embracing it, and all that it stands for.

The Court of Appeals' willingness to overlook a century of squarely applicable case law pertaining to corporeal evidence, favoring the *sub silentio* creation of a new exception to the Fifth Amendment, by the misapplication of an existing one, is as misguided as it is dangerous.

* * *

At the risk of complicating an already challenging legal conundrum, the Petitioner respectfully continues.

In the dissent below, Judge Ciparick and Chief Judge Kaye identify an accompanying Sixth Amendment violation that was perpetrated upon the accused at the time of his arrest. It is in this context that the following is submitted for the Court's consideration. Pet. App. 10a-15a.

Petitioner, at the time he was presented to the office of the District Attorney, was accompanied by retained counsel who verbally, and in writing, advised the authorities that Petitioner was invoking his various Fifth Amendment protections and that any evidence could only be gathered by operation of N.Y.C.P.L. 240.40 (2)(b)(iv). Mentioned earlier, this statute, mirroring this Court's corporeal evidence exception, provides a mechanism whereby the people can obtain, upon motion, and "subject to constitutional limitation"... "non-testimonial" evidence such as hair, blood, voice exemplars, handwriting samples, fingerprints and photos. Pet. App.16a-17a.

Notwithstanding the admonishment by counsel regarding exemplars, the Prosecutrix, while still within the confines of the District Attorney's office, forced Petitioner, over his objection, to strip for the purpose of photographing the tattoos which appear on his body. The photos were then submitted to the grand jury for their testimonial and

communicative value, not as real or physical evidence. Petitioner contends that this forced display, coyly and shrewdly conducted after counsel had departed and over Petitioner's objection, constituted the impermissible extraction of testimonial evidence in contravention of Petitioner's Sixth Amendment right to counsel.

There are several separate and distinct constitutional questions which emanate from these facts. First, if the evidence sought and obtained during this procedure is determined to be testimonial, then it logically follows that the process described constitutes a patent violation of both the accused's Fifth Amendment right to remain silent and his Sixth Amendment right to counsel, both of which were asserted, in writing, prior to the Petitioner being taken into custody.

This contextual wrinkle compels an even deeper discussion of the Fifth Amendment and its relationship to the Sixth Amendment. Moreover, it is apparent that this sub-plot was equally important to the majority below and pointed to by them as a way of quelling the Fifth Amendment claims advanced by Petitioner. The majority below suggests that, since the evidence was gathered in a manner consistent with the Fourth Amendment, Petitioner's Fifth and Sixth Amendment claims were thereby trumped. Petitioner disagrees.

In the Courts majority opinion, the New York Court of Appeals states "*even if, as the dissent contends, the trial Court erroneously authorized the taking of the second set of photographs, defendant suffered no prejudice as a result because....the first set of photographs would have been admissible at trial.*" Pet. App. 9a. Regardless of whether the evidence was obtained without violating the Fourth Amendment, the process described constitutes the compelled extraction of *"testimonial evidence"* [Couch v. U.S., 409 U.S. 322, 327-328 (1975); Doe v. U.S., 487 U.S. 201, 209-211

(1988)] and is therefore unconstitutionally obtained and inadmissible at trial by operation of the Fifth Amendment's right to remain silent, the self-incrimination clause and the Sixth Amendment's right to counsel. Since both the ingredient of compulsion, as well as the "*testimonial nature*" of that which was sought and obtained are present, the Court of Appeals' analysis is flawed, replete with rationalizations and creates a variety unforeseen constitutional entanglements. Dawson v. Delaware, 503 U.S. 159 (1992); *Miranda v. Arizona, infra.*

Notwithstanding the Court of Appeals' questionable Fourth Amendment analysis, the real issue is whether or not Petitioner's Fifth and Sixth Amendment protections were transgressed by this post-arrest, pre-arraignment, coerced gathering of testimonial evidence. Petitioner contends that, under these facts, there is no constitutional distinction between the coerced extraction of testimonial evidence by forcing an accused to strip for the purpose of obtaining the evidence and the forced extraction of an oral admission outside the presence of counsel.

Even if, arguendo, the forced strip was constitutionally permissible from a Fourth Amendment perspective, this can not overcome Petitioner's Fifth and Sixth Amendment contentions The fact remains that the evidence was compelled from him and it was both testimonial and communicative. For brevity's sake, Petitioner emphasizes that: 1) the forced strip, over objection, was nothing like a routine booking procedure; 2) that the process described was more akin to a forced confession obtained outside the presence of counsel than a routine booking and 3) even if the strip was authorized by the Fourth Amendment, the gathering of testimonial evidence remains prohibited by operation of the Fifth and Sixth Amendments and should therefor have been excluded from use at trial. Estelle v. Smith, 451 U.S. 454, 470-473 (1981).

* * *

> In *Miranda v. Arizona*, 384 U.S. 436, 439 (1966), this Court held *"The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence... we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."* (Emphasis added).

The case before this Court also challenges the historical definition of testimonial evidence as seen in cases like *Hubbell* and *Fisher, supra,* with the constitutional doctrines encompassed by *Miranda* and its progeny. Cutting directly to the point, if testimonial evidence is that which has been defined in *Doe, Hubbell, Schmerber, etc.*, the question becomes, did law enforcement, by stripping Petitioner for the sole purpose of obtaining testimonial evidence, violate his Sixth Amendment protections as provided for in *Miranda*. This question, although easily framed, is not so easily answered.

These facts provide a unique opportunity to explore that combination of protections that are the measure of our civilization. Here, the Petitioner unqualifiedly asserted his right to remain silent, was actually represented by counsel, verbally and in writing advised the authorities *vis a vis* the invocation of these rights and, in recognition of their testimonial qualities, rejected requests for photos. Nevertheless, upon the departure of counsel, Petitioner was forcibly stripped for the singular purpose of obtaining *"testimonial evidence"* that was later submitted to a grand jury in lieu of a confession. Even more offensive is the fact that the

photos were displayed to the public during press conferences held by the District Attorney. This is repugnant.

This unbelievably unique set of facts and circumstances preserves, in a vacuum, an intricate constitutional question. That is to say, that there are no factors, other than the nature and scope of the Fifth and Sixth Amendment privileges, to be considered when determining the issue. For instance, there is not even the hint that the evidence obtained was material or relevant insofar as identification was concerned. Nor is there any question as to whether or not the Petitioner had asserted his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Even the question regarding the testimonial nature of the evidence has been settled, as has the ingredient of compulsion. These circumstances leave the Court with a scenario that presents, undiluted and in itspurest form, a significant constitutional controversy that could shape American jurisprudence.

If, as this Court has repeatedly held, Sixth Amendment violations exist when the government, after the accused has invoked his right to counsel, "*deliberately elicits incriminating statements*" [*U.S. v. Henry*, 447 U.S. 264 (1980)], then it would logically follow that the testimonial evidence forcibly obtained at the time of his arrest would have been suppressed by operation of the Petitioner's Sixth Amendment protections as well as his Fifth Amendment rights and privileges. Accordingly, the lower Court's reliance, on the "first set of photos" as justification for the second set, is equally misguided. Pet. App.8a-9a, 13a.

* * *

That *"no person shall be compelled in a criminal case to be a witness against himself and that the accused shall...have the assistance of counsel"* are rights that were *"fitted in our constitution after centuries of persecution and struggle and*

were secured for ages to come...designed to approach immortality as nearly as human institutions can approach it." Cohens v. Commonwealth of Virginia, 6 Wheat. 264, 387 (1821). In this case, what was thought to be enshrined with the "*impregnability of a constitutional enactment*" has been marginalized and quietly dispatched. Brown v. Walker, 161 U.S. 591, 596-597 (1896). Whether as the result of prosecutorial zeal, judicial rationalization or honest misapprehension, the result sponsors, rather than repudiates, an inquisitorial criminal process, ignores the sanctity of the individual and opens doors the framers intentionally, and without reservation, locked shut.

The question now becomes: can any trial so tainted with pervasive constitutional error be called a fair one. The Fourteenth Amendment's free standing right to a fair trial was a casualty the State was willing to accept in order to obtain a conviction and the Appellate Courts were willing to overlook in order to preserve one.

Historically, this Court has repeatedly concluded that there exists a class of constitutional rights so basic to a fair trial that their infraction can rarely be treated as harmless error. Chapman v. California, 386 U.S. 18, 21, 23 (1967). Among these sacrosanct privileges are the Fifth Amendment's right to remain silent, protection against coerced self incrimination and the Sixth Amendment's right to counsel, all of which are the subject of this Petition.

Since the commencement of this criminal proceeding there has been a pervasive pattern of excuses, justifications, and rationalizations, seemingly engineered to deprive Petitioner the fundamental protections enunciated in the Bill of Rights. Perhaps, this was the result of the Petitioners unpopular beliefs or maybe the by-product of notoriety or even the political pressures that invaded the trial. Whatever the source, the belief

that Petitioner was not entitled to constitutional protection metatastisized.

In *Chapman, supra*, this Court concluded by remarking "*such a machine gun repetition of a denial of constitutional rights, can no more be considered harmless then the introduction against a Defendant of a coerced confession.*" *Id.* 26. By application of this standard to the facts of this case, reversal becomes manifestly self evident.

III This case concerns fundamental constitutional protections.

In the event certiorari is granted, this Court will see, first hand, the ill effects a miserly approach to the Bill of Rights can have on the criminal prosecution of one man. When reviewing the Appellate Court's determination, this Court will see how parsing the words of the framers, and opinions of this Court can, with the stroke of a pen, dispatch those freedoms and pervert the law of the land.

This is an important case. Not so much because one man was deprived a fair trial, or whose conviction was preserved by reconfiguring our constitution to sustain a desired result, but more so because the entire State of New York now operates under the same misguided and dangerous rule of law.

Conclusion

The Petition for a writ of certiorari should be granted.

Respectfully Submitted

ROBERT J. DEL COL, ESQ.
34 Dewey Street
Huntington, New York 11743
(631)-271-4684

----------X

The People & c.,

Respondent,

v.

Christopher Slavin,

Appellant.

----------X

Robert J. Del Col, for appellant.
Michael Blakey, for respondent.

READ, J.:

We are called upon to decide whether the trial court violated the defendant's Fifth Amendment privilege against self-incrimination by allowing the People to introduce photographs of upper body tattoos, taken over defendant's objection, as evidence of motive for committing a hate crime. We conclude that defendant was not "compelled * * * * to be a witness against himself" (US Const, 5th Am) within the meaning of the privilege. The tattoos were physical characteristics, not testimony forced from his mouth (see Schmerber v. California, 384 US 757, 764-65 [1966]; People v. Berg, 92 NY2d 701, 704 [1999]). However much the tattoos may have reflected defendant's inner thoughts, the People did not compel him to create them in the first place (compare United v. Hubbell, 530 US 27, 35-36 [2000]).

I.

In the early morning hours of September 17, 2000, defendant and an accomplice lured two Mexican "day laborers" into a car with the false promise of work, and drove them to an abandoned building in Suffolk County on Long Island. During the drive, defendant asked the two men whether they were

Mexicans. Almost immediately after arriving at the building, defendant and his accomplice launched an unprovoked and brutal attack on their two unsuspecting victims. Defendant struck both men in the head with a metal post hole digger, while his accomplice stabbed one of them several times. The two victims, on of whom was bleeding profusely, contrived to escape their assailants by fleeing onto the Long Island Expressway. There, a passing motorist rescued them.

The extensive police investigation that followed the attack quickly focused on defendant and his accomplice. Defendant's accomplice turned himself in about a month after the crime. Three weeks later, defendant, accompanied by counsel, surrendered at the District Attorney's Office. Counsel informed the authorities that defendant would not be making any statements, and rejected the District Attorney's request for "voluntary exemplars." During arrest processing, law enforcement officials – over defendant's objections – took photographs of his various tattoos. Defendant's two victims did not observe the tattoos during the attack.

On the back of defendant's neck, just below his hairline, his skin was tattoed in black with the letters "ACAB" (All Cops Are Bastards"). On defendant's right upper arm, the letters "FTW" ("Fuck The World") were tattooed in red, and the letters "NYHC" ("New York Hard Core" or "New York Hate Corp") were tattooed in black. A tattoo on defendant's right upper chest pictured a Nazi Swastika in black, crosscut with a white fist and encircled by the Celtic cross in red and black. The tattoo on defendant's torso above his waistline depicted a cartoonish figure with a large nose, wearing a skullcap and a coat with money protruding from a pocket. This figure was kneeling with hands raised in supplication at the approach of a skinhead with an outstretched, outsized foot. The skinhead

wore "Doc Martin" boots, rolled up pants and red suspenders. Clutching an axe and a square-shaped bottle, his visage was sinister and clownlike, with a protuberant red nose.

Defendant's upper left arm also bore several elaborate tattoos, including an American flag above the Nazi Swastika below a cloud; another Celtic cross; a skinhead holding a club and restraining a leashed pit bull wearing a spiked collar; a bald eagle; two lightning bolts, the symbol for the Nazi "SS"; a skinhead wearing suspenders on a bare chest and holding a flaming torch as he stepped upon human skeletal remains; and a tank crushing human skulls as it emerged from a city of fire. The tattoos on defendant's left forearm featured an arrow projecting from a cloud or waterbody; a Viking ship with may shields along its side; and two burly Viking figures, on of which was blowing a horn.

In securing an indictment of defendant, the People presented the arrest photographs of these tattoos to the Grand Jury. Arguing that his rights under the Fourth, Fifth, and Sixth Amendments had been violated, defendant moved to dismiss the indictment and failing that, to preclude the use of the photographs at trial. The trial court rejected defendant's motion.

In finding no Fourth Amendment violation, the trial court remarked that it was "hard for [him] to believe that this defendant has a legitimate expectation of privacy during [his arrest] processing, especially on recognized by society, a point [he] does not attempt to argue." He also cited CPL 160.10 (3), which provides that whenever fingerprinting of an arrestee is required or allowed, "the photograph * * * of the arrested person or the defendant, as the case may be, may also be taken." As for defendant's Sixth Amendment claim, the trial

court held that arrest processing was not a "critical stage" mandating the presence of counsel.

In rejecting defendant's Fifth Amendment claim, the trial court relied largely on Schmerber v. California, (384 US 757, supra). There, the Supreme Court held that the privilege against self-incrimination protects an "accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature" (id. At 761). Accordingly, in Schmerber the Court concluded that the compelled withdrawal of blood from a drunk driving suspect did not violate the privilege because the "blood test evidence, although an incriminating product of compulsion, was neither (the suspect's) testimony nor evidence relating to some communicative act or writing by the [suspect]" (id. At 765). Extrapolating from Schmerber, the trial court found that defendant's tattoos were not testimonial evidence, but simply physical characteristics, and that the privilege does not bar the introduction of photographs resulting from the compelled exhibit of a suspect's body.

In addition to denying defendant's motion, the trial court also granted the People's motion to take a second set of photographs pursuant to CPL 240.40. This provision vests a trial court with the discretion to order a defendant to provide "non-testimonial evidence," including having to "[p]ose for photographs not involving reenactment of an event" (CPL 240.40 [2][b][iv]). The trial court determined that the tattoos were relevant to defendant's motive for committing the charged hate crime of second-degree aggravated harassment. At the time, this provision made it a crime for a person "with intent to harass, annoy, threaten or alarm" to "[s]trike [], shove [], kick[], or otherwise subject [] another person to physical contact , or attempt [] or threaten [] to do the same because of the race,

color, religion or national origin of such person" (Penal Law 240.30 [3], as enacted by L 1982, c 191, §1). [1]

Before jury selection, defendant moved to preclude the introduction of the second set of photographs, reiterating his objection under the Fifth Amendment and disputing relevancy. The trial court again denied defendant's motion.

At trial, the People introduced the photographs of defendant's tattoos through the testimony of a friend, who identified them as depicting tattoos that he had observed on defendant's body prior to the attack. The People also presented a witness who was qualified as an expert in bias and hate crimes. This expert testified as to the customary meaning of the letters, symbols and pictures represented in defendant's tattoos. The trial court directed the expert not to testify that defendant belonged to or shared the views of any particular group; he also instructed the expert not to offer testimony as to what defendant may have been thinking during the attack. In allowing the expert's testimony, the Court again rejected various Fifth Amendment and relevancy arguments raised by defendant.

The jury convicted defendant of two counts of attempted second-degree murder; one count of first-degree assault and one court of second-degree assault; and two counts of second-degree aggravated harassment. The Appellate Division affirmed, and a Judge of this Court granted defendant leave to appeal.

II.

Defendant argues that the photographs were introduced

---

[1] Penal law 240.30 (3) now encompasses a broader range of prohibited conduct (see L 2000, c 107, § 3).

to establish his motive for committing a hate crime by disclosing his subjective thoughts and beliefs on the issue of race. And that, he claims, constituted compelled "testimonial" evidence forbidden by the Fifth Amendment privilege against self-incrimination. We disagree. Although the jurors may have inferred defendant's motive from the existence of the tattoos, the tattoos were not compelled testimony within the scope of the privilege.

As an initial matter, the privilege does not preclude a criminal defendant from being required to exhibit physical characteristics or to provide physical exemplars. Indeed, "a person can be forced to produce 'real or physical evidenc'" (People v. Berg, 92 NY2d at 704, quoting Schmerber v. California, 384 US at 764). Further, "there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating" (United States v. Hubbel, 530 US at 34-35). In the latter situation, the privilege is not violated because "'the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material'" (id. At 35 n9, quoting Holt v. United States, 218 US 245. 252-53 [1910]).

There is not doubt that defendant's tattoos were, as the trial court concluded, "physical characteristic." Nor is there any dispute that the People took the Photographs of the tattoos over defendant's objections. The issue thus becomes whether the privilege is implicated here because this particular "real or physical evidence" Schmerber v. California, 384 US at 764) may have reflected defendant's though processes. In this regard, we consider it dispositive that there is no fifth

Amendment protection for the contents of preexisting documents. Indeed, it is a settled proposition that a person may be required to produce specific documents [in response to a subpoena] even though they contain incrimination assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the provilege" (United States v. Hubbell, 530 US at 35-36).

Thus, the privilege does not necessarily bar compelling the disclosure of evidence that a criminal defendant created voluntarily in the past, even if the evidence betrays "incriminating assertions of fact or belief" (id. at 35; see also United States v. Doe, 465 US 605, 610-11 [1984], citing Fisher v. United States, 425 US 391 [1976] [privilege does not protect contents of documents created voluntarily]).

Nor, as the dissent implies, does this act-of-production doctrine come into play in this case. This doctrine derives from the distinction drawn by the Supreme Court in Fisher between the testimonial aspects of the content of evidence and its production, which "has communicative aspects of its own, wholly aside from * * * content []" (Fisher v. United States, 425 US at 410). The Court identified those communicative aspects of the act of production as the tacit concession that papers produced in response to a subpoena duces tecum exist; are in the defendant's possession and control; and are those described in the subpoena. Whether a particular production of documents involves a tacit testimonial communication of these facts would "depend on the facts and circumstances of particular cases or classes thereof" (id.). In Fisher itself, the act of production did not run afoul of the provilege because the government already knew about the subpoenaed papers' existence and location.

Here, the People obviously knew about defendant's tattoos at the time of his arrest;[2] therefore, defendant was not required to disclose the existence of his tattoos or to describe them. Simply put, defendant was not at any time compelled to "restate, repeat or affirm the truth of the [] contents" of the tattoos (United States v. Doe, 465 US at 612). Thus, even if requiring him to take his shirt off[3] and pose for arrest photographs is considered analogous to the act of production of subpoenaed documents, the People were not relying on defendant's "truthtelling" to discover the existence of his tattoos (Fisher v. United States, 425 US at 411 ["under these circumstances * * * 'no constitutional rights are touched. The question is not of testimony but of surrender'", quoting In re Harris, 221 US 274 279 (1911)]).

Nothing that occurred here implicated defendant's privilege against self-incrimination. The People legally took two sets of photographs (initially, during arrest processing; later, by court order) of tattoos that defendant created

---

[2] Defense counsel certainly seems to have understood the District Attorney's request for "exemplar evidence" to have been aimed at obtaining photographs of defendant's tattoos. How the authorities learned about defendant's tattoos is not clear from the record before us. Only the tattoo on the back of defendant's neck would have been plainly visible when he was wearing a long-sleeved shirt. The lead detective on the case, however, was a memeber of Suffolk County Police Department's Bias Crimes Unite and so, at the very least, likely understood what this tattoo (the letters "ACAB") signified. Further, the People had interviewed several of defendant's former girlfriends during their investigation of the crime.

[3] Defendant is picture wearing trousers in the photographs attached to his motion to preclude and in those photographs admitting into evidence.

voluntarily, long before he committed his crime. [4] (His friend testified that defendant had acquired the most recent tattoo at least five years earlier.) The People did not force defendant to reveal his thoughts and beliefs; they presented an expert witness who testified about the customary meaning of the images depicted by defendant's tattoos. The trial court instructed the expert not to opine as to what defendant may have been thinking during the attack.

In sum, the tattoos may have been incriminating in the sense of potentially reflecting defendant's "subjective knowledge or thought processes" (People v. Hager, 69 NY2d 141, 142 [1987]), but defendant created this evidence of his own accord, without any compulsion from the People. Defendant was therefore not "compelled * * * to be a witness against himself" (US Const, 5th Am) within the meaning of the privilege (see United States v. Hubbell, 530 US at 35-36; see also Matter of Grand Jury Subpoena Deces v. Kuriansky, 69 NY2d 232, 242, cert denied sub nom 482 US 928 [1987]). [5]

Accordingly, the order of the Appellate Division should be affirmed.

---

[4] Even if, as the dissent contends, the trial court erroneously authorized the taking of the second set of photographs, defendant suffered no prejudice as a result because neither set of photographs violated his Fifth Amendment privilege. Accordingly, the first set of photographs would have been admissible at trial. Moreover, assuming that the second set of photographs did not fit within the meaning of "non-testimonial evidence" obtainable by court order pursuant to CPL 240.40, "the admissibility of evidence in the face of the Self-Incrimination Clause does not turn on the presence or absence of" statutory authorization (People v. Berg, 92 NY2d at 706). Indeed, "if evidence is constitutionally permissible, the absende of authorization in a statute does not make it impermissible: (id.).

[5]We also reject defendant's claims under the Fourth and Sixth Amendments (see Schmerber v. California, 384 US at 765-766 771-72)

CIPARICK, J. (dissenting in part):

Because I believe that by being forced to submit to the photographing of his tattoos, the defendant was compelled to be a witness against himself in violation of his Fifth Amendment privilege against self-incrimination, I respectfully dissent.

The fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself" (US Const, 5th Amend) and encompasses testimonial or communicative evidence (see Schmerber v. California, 384 US 757, 761 [1966]). In order to be considered testimonial, "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" (Doe v. United States, 487 US 201, 210 [1988]; see also People v. Berg, 92 NY2d 701, 704 [1999]). "Evidence is 'testimonial or communicative' when it reveals a person's subjective knowledge or thought processes" (People v. Hager, 69 NY2d 141, 142 [1987] [citations omitted]). The privilege against self-incrimination seeks, at least in part, "to spare the accused from * * * having to share his thoughts and beliefs with the Government" (Doe, 487 US at 213).

Inasmuch as neither of defendant's victims saw his tattoos, the tattoos were not offered for the purpose of identification, but as evidence of motive. It is certainly true that, typically, corporeal evidence falls outside the scope of the Fifth Amendment because a person's physical characteristics are neither testimonial nor communicative. But when, in a case such as this one, corporeal evidence is offered for its testimonial value, the privilege against self-incrimination is clearly implicated. Today the court ignores that critical distinction.

Typically, "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the protection of the Fifth Amendment]" (Gilbert v. California, 388 US 263, 266-267 [1967]; see also United States v. Dionisio, 410 US 1, 6-7 [1973]). But when "the content of the exemplars was testimonial or communicative matter" (Gilbert, 388 US at 266-267), a handwriting sample will be protected. Similarly, defendant's tattoos were offered here not as identifying characteristics, but for the message they conveyed and to prove defendant's thoughts and state of mind at the time the crimes were committed. It was thus the meaning and content of the tattoos, established through expert testimony, and not the fact that a particularly shaped and colored marking was located on a particular part of the defendant's body, that gave this evidence its relevance. Indeed, the People do not argue otherwise.

In being forced to remove his clothing and reveal tattoos that were used as proof of his subjective beliefs, defendant was thus compelled to provide evidence of a testimonial nature. The Court recognizes the communicative quality of defendant's tattoos (majority opn at 9), but nonetheless concludes that defendant was not compelled to incriminate himself within the meaning of the Fifth Amendment, relying on a line of Supreme Court cases applicable to subpoenas for documents.

The analogy is dubious at best.[1] Surely the forced strip

---

[1] As the Supreme Court has often stated, "one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal provacy" (see e.g. Fisher v. United States, 425 US 391, 299 [1976]).

search of a defendant constitutes a far greater invasion into privacy rights that a subpoena for documents. But even if I were to accept the anology, still I would conclude that defendant's privilege against self-incrimination was violated. In ruling otherwise, the Court has misunderstood the import of the Supreme Court's relevant precedent.

The Court's reference to the proposition that one may be required to disclose documents that contain incriminating evidence when the individual was not "compelled" to create those documents (see majority opn at 8-9, citing United States v. Hubbell, 530 US 27, 35-36 [2000]; United States v. Doe, 465 US 605, 610-611 [1984]; Fisher v. United States, 425 US {1976]) tells only half the story. What the Court fails to recognize is that the content of incriminating documents may nevertheless be privileged if a subpoena forces the defendant to "restate, repeat or affirm the truth of their contents" (United State v. Doe, 465 US at 611-612; see also Hubbell, 530 US at 36 n 18), and that the act of production of testimonial evidence can have independent testimonial or communicative significance (see Fisher, 425 US at 410), such as when, by producing the documents, "the witness would admit that the papers existed, were in his possession or control, and were authentic" (Hubbell, 530 US at 36 n 19 [citations omitted]). If such an admission is itself incriminating, its compulsion will violate the Fifth Amendment. The Court's conclusion that the privilege does not bar compelling the production of evidence that a criminal defendant voluntarily created in the past (majority opn at 9) thus mischaracterizes the holding of Hubell.

Here, the defendant's tattoos were used to demonstrate his current beliefs or state of mind. Since they were offered for the purpose of proving defendant's motive for the attacks, the tattoos were being used to show his "subjective knowledge or

thought processes" (Hager, 69 NY2d at 142), and constituted testimonial evidence. Although defendant was not compelled to ink these images onto his skin, he was forced at the time of arrest to reveal his tattoos, obtained years before, which – in requiring him to impliedly affirm and adopt the message they conveyed as reflective of his current racist beliefs – compelled him to perform an ac t with independent testimonial significance.

I cannot agree, moreover, with the Court's conclusion that the photographs originally taken of the defendant's tattoos upon his arrest were in any event permitted because they were obtained during normal arrest processing. The record reflects that all of defendant's tattoos – with the exception of one on the back of his neck (the initials "A.C.A.B.," likely meaningless to most people) – were located on areas of defendant's body covered by his everyday clothing. "[W]hat he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (Katz v. United States, 389 US 347, 351 [1967]).

Nor, despite the People's contention, could these purported "arrest photographs" be justified as part of the routine booking procedures to which all arrestees are subject (see CPL 160.10 [3]). Typical arrest photographs consist of front and side view "mug shots" of the face, necessary for the administrative purpose of identifying those in the custody of the police. Here, defendant, over his objection, was required to remove articles of clothing to allow authorities to photograph his naked torso. We have never held that strip searches are, without more, automatically justified by a lawful arrest or permitted as a routine part of the booking process (see People

v. More, 97 NY2d 209 [2002])[2] Nor could we (see e.g. Weber v. Dell, 804 F2d 796 [2nd Cir 1986], cert denied sub nom, 483 US 1020 [1987]). It is neither administratively necessary nor routine for the police to take such photographs which, here, were clearly taken as part of an investigative search for evidence.

In any event, the photographs actually introduced at defendant's trial were those secured pursuant to the CPL 240.40 order issued by County Court, not those taken at the time of his arrest. But these, too were unlawfully obtained. The statute provides that "[u]pon motion of the prosecutor, and subject to constitutional limitation, the court * * * may order the defendant to provide non-testimonial evidence" (CPL 240.40 [2] [b] [iv]}. CPL 240.40 could not authorize the photographs of defendant's tattoos both because they were testimonial in nature, revealing his subjective thoughts, and because they violated defendant's Fifth Amendment privilege against self-incrimination. Inasmuch as the Court concedes that defendant's tattoos reflected his subjective knowledge or thought processes (see majority opn at 11), it is hard to imagine

---

[2] The Court notes that County Court rejected defendant's Sixth Amendment claim because "arrest processing was not a 'critical stage' mandating the presence of counsel" (majority opn. At 4-5). But since arrest processing does not permit compelled self-incrimination, forcing defendant to strop in an effort to gain testimonial evidence was not part of any routine booking procedure constituting a non-critical stage. In any event, a defendant only has no right to counsel at a non-critical stage in the absence of a request (see People v. Shaw, 72 NY2d 1032, 1033 [1988]). Here, defendant's retained counsel had already entered the case and informed the prosecutor that defendant would make no statements and that defendant specifically rejected the People's request that he privide "voluntary exemplars,: including photographs of his body. After counsel left, however, defendant, over his objection, was stripped and the tattoos of his body were photographed. Testimonial evidence of defendant's tattoos way thus

how the Court can escape the conclusion that the testimonial photographs admitted at defendant's trial were obtained in violation of the statute pursuant to which they were secured and therefore had to have been suppressed.

Defendant's heinous crimes and despicable beliefs do not exempt him from the protections of the Constitution or the law. The admission at defendant's trial of evidence of his tattoos, obtained by compulsion, to demonstrate his subjective beliefs and thought process plainly violated his privilege against self-incrimination. Nevertheless, inasmuch as proof of defendant's guilt of attempted murder and assault was overwhelming, the error with respect to his conviction of those felony charges was harmless beyond a reasonable doubt (see People v. Crimmins, 36 NY2d 230, 237 [1975]). But because the proof that defendant's actions were motivated by the ethnicity of his victims was in the absence of evidence of his tattoos, minimal, I would reverse his conviction of aggravated harassment in the second degree.

* * * * * * * * * * * * * * *

Order affirmed. Opinion by Judge Read. Judges George Smith, Rosenblatt and Graffeo concur. Judge Ciparick dissents in part and votes to modify in an opinion in which Chief Judge Kaye concurs. Judge Robert Smith took no part.

Decided February 17, 2004

C.P.L. 240.40 (2)(b)(iv)

Upon granting the motion pursuant to paragraph (c) hereof, the court shall, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, the people of property, of the same kind or character as that authorized to be inspected by the defendant, which he intends to introduce at the trial.

2. Upon motion of the prosecutor, and subject to constitutional limitation the court in which an indictment, superior court information, prosecutor's information, information, information, or simplified information charging a misdemeanor is pending;

(a) must order discovery as to any property not disclosed upon a demand pursuant to section 240.30., if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

(i) Appear in a line-up;
(ii) Speak for identification by witness or potential witness;
(iii) Be fingerprinted;
(iv) Pose for photographs not involving reenactment of an event;
(v) Permit the taking of samples of blood, hair, or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;
(vi) Provide specimens of his handwriting;
(vii) Submit to a reasonable physical or medical inspection of his body. *(Chgd. By L. 1983, chap. 317(3); eff. 7/21/83.)*

This subdivision shall not be construed to limit, expand,

or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistant with such rights as the defendant may derive from the constitution of the state or of the United States. This section shall not be construed to limit or otherwise affect the administration of a chemical test where otherwise authorized pursuant to section one thousand one hundred ninety-four-a of the vehicle and traffic law. *(Chdg. By L. 1983, chap. 481 (4); eff. 10/13/83.)*

3. An order pursuant to this section may be denied, limited or conditioned as provided in section 240.50.

At a Term of the County Court, Part 3, of the County of Suffolk, held at the Criminal Courts Building, 200 Center Drive, Riverhead, New York, on the 26, day of February, 2001.

PRESENT:

HONORABLE CHARLES CACCIABAUDO
COUNTY COURT JUDGE

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CHRISTOPHER SLAVIN,

Defendant.

----------X

ORDER
CASE NUMBER:
1-2452A-00

An application having been made by Eileen A. Powers, Esq., Assistant District Attorney of Suffolk County, for an order to require the defendant to permit the taking of samples of his head hair, saliva and blood pursuant to C.P.L. Section 240.40 (2)(b)(v), and pose for photographs not involving re-enactment of an event pursuant to C.P.L. Section 240.40 (2)(b)(iv).

NOW, upon reading and filing the affidavit of Eileen A. Powers, Esq., Assistant District Attorney, submitted January 9, 2001, in support of said application it is:

ORDERED AND DIRECTED, that the defendant, CHRISTOPHER SLAVIN, permit the taking of a sample of his head, saliva and blood by a qualified person in the medical unit of the Suffolk County Correctional Facility in which he is incarcerated, at a time to be arranged by the District Attorney of Suffolk County after notice to Robert Del Col, Esq., the defendant's attorney, and it is further

ORDERED AND DIRECTED, that the defendant CHRISTOPHER SLAVIN pose for photographs of his body to be taken by a person(s) designated by the Suffolk County District Attorney's Office, at a time to be arranged by the District Attorney of Suffolk County after notice to Robert Del Col, Esq., the defendant's attorney, and it is further

ORDERED AND DIRECTED, that defense counsel be permitted to be present at the time the samples and photographs are taken, if he so desires, and it is further

ORDERED AND DIRECTED, that reasonable force, if necessary, be used.

ENTER
S/_____
HON. CHARLES CACCIABAUDO

Granted
Feb 26, 2001
Edward P. Romaine
Clerk of Suffolk County

MEMORANDUM

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

CHRISTOPHER SLAVIN,

Defendant.

----------X

By: HON. CHARLES F. CACCIABAUDO
J.C.C.

Case No. 2452A-00

HON. JAMES M. CATTERSON, JR., ESQ.
Suffolk County District Attorney
By: EILEEN A. POWERS, ESQ.
Arthur M. Cromarty Court Complex
200 Center Drive
Riverhead, New York 11901

ROBERT J. DEL COL
Attorney for Defendant
34 Dewey Street
PO Box 1850
Huntington, New York 11743

* *

This defendant stand charged with two counts of

Attempted Murder in the Second Degree, Assault in the First Degree, Assault in the Second Degree, and two counts of Aggravated Harassment in the Second Degree.

By notice of motion dated December 19, 2000, defendant moves this Court for and Order for the preclusion/suppression of evidence; severance; to review the Grand Jury minutes; and the dismissal of the first tow counts of the indictment. Defendant also requests a response to his Demand for Discovery and Bill of Particulars.

The People submitted a Response to Defendant's Demand for Discovery and Bill of Particulars, as well as a Reciprocal Discovery Demand dated January 9, 2001. Further, the People submitted an Affidavit in Opposition dated January 11, 2001. The People also submitted the Grand Jury minutes for an in-camera review. Finally, the People submitted a Notice of Motion requiring the defendant to submit to the taking of blood, hair and saliva samples, as well as pose for photographs pursuant to CPL §240.40(2)(b)(v).

Defendant submitted a Notice of Cross Motion dated February 2, 2001, opposing the People's request and revisited issues addressed in his earlier motion.

The People then submitted an Affidavit in Opposition dated February 8, 2001.

Having reviewed all moving papers and the applicable law, this court finds as follows:

GRAND JURY MINUTES

This Court has examined the Grand Jury minutes and

found the evidence contained therein to be legally sufficient to uphold the charges contained in the indictment or any lesser included offense (People v. Jennings, 69 NY2d 103 (1986)).

Accordingly, defendant's application for dismissal of the first two counts of the indictment for legal insufficiency is DENIED.

Further, defendant's application for the release of the Grand Jury minutes is DENIED inasmuch as the Court does not require the assistance of the defendant in its determination of the motion (CPL §210.30 (3)).

DEMAND FOR DISCOVERY/BILL OF PARTICULARS

The People have satisfactorily responded to both defendant's Demand for Discovery and Bill of Particulars.

PRECLUSION/SUPPRESSION OF EVIDENCE

Defendant argues that all photos of his bodily tattoos taken during his arrest processing should be deemed as statements. As such, defendant argues that the People should be precluded from using those "statements" at the time of trial for failure to comply with CPL §710.30 and on the grounds that the defendant's constitutional rights were violated at the time the photographs were taken.

The People oppose defendant's motion and argue that his request for suppression is insufficient as per statute, the photographs should not be deemed statements, and accordingly, those photographs are not under the purview of CPL §710.30.

Further, the People argue that the defendant lacks standing as to his constitutional arguments and has failed to establish how such would support the suppression of the photographs.

SUFFICIENCY OF REQUEST

Defendant moves to suppress the photographs taken of his bodily tattoos at the time of his arrest.

The People oppose defendant's motion and argue that his request is procedurally improper.

The burden is on the People to show the legality of police conduct - i.e., the existence of probable cause, by clear and convincing evidence (People v. Bouton, 50 NY2d 130 (1980); People v. Gayle, 187 AD2d 450 (2d Dept. 1992)). Once completed, the burden then shifts to the defendant to show that no probable cause existed or that the evidence should otherwise be suppressed by the preponderance of the evidence (People v. Sanchez, 151 Misc. 2d 431 (Sup. Ct. Kings Co. 1991)). It is not enough to prove that the evidence was illegally observed prior to its seizure. The defendant must show that the probable cause was illegally derived under those circumstances (People v. Reynolds, 71 NY2d 552, 558 (1988)).

Generally, however, a hearing is "not available merely for the asking" (People v. Gruden, 42 NY2d 214, 217 (1977)). Where motion papers are conclusory in nature and contain no factual allegations supporting defendant's claim, the motion may be denied without a hearing (CPL §710.60(1), (3), (6)). The sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's

access to information (People v. Mendoza, 82 NY2d 415, 426 (1993)).

In the case at bar, probable cause is not an issue. This defendant surrendered himself to the police on the outstanding charges on November 2, 2000. Defendant fails to address the probable cause issue (or lack thereof) as well as provide any factual allegations in support of his motion.

CPL §710.30

The law is clear that evidence of a written or oral confession, admission, or other statement made by the defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made (CPL §60.45). Further, types of statements must be noticed as evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion (CPL §710.30 (1)(a)). However, such evidence must have been acquired unlawfully or improperly and the defendant must establish that such evidence consist of a record or potential testimony reciting or describing an involuntarily mad statement of such defendant (CPL § 710.20(a); §60.45).

In the case at bar, defendant cites no authority other than his conclusory allegations that the photographs equate to statements and should have been noticed. This Court agrees with the People that said photographs reflect physical characteristics of the this defendant and are not under the purview of CPL §710.30. As such, no notice to the People's intent to use these photographs at the time of trial is required.

CONSTITUTIONAL ARGUMENTS

Defendant argues that the taking of the photographs of his body during processing constituted an unlawful search and seizure and violated his Fourth Amendment right to privacy. Further, defendant argues that as the photographs should be deemed testimonial, his Fifth Amendment right against self incrimination was violated. Finally, defendant argues that by his attorney not being present during the taking of said photographs, his Sixth Amendment right to an attorney was violated.

The People oppose defendant's motion.

A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object search that society recognizes as reasonable. If the court determines that the defendant had a legitimate expectation of privacy in the item searched, standing to challenge the legality of the police conduct is established (People v. Ramirez-Portoreal, 88 NY2d 99 (1966)). However, conduct and activity which is readily open to public view is not protected (People v. Reynolds, 71 NY2d 552 (1988)).

In the case at bar, the photographs in dispute were taken during the processing of this defendant after his lawful arrest. It is hard for this Court to believe that this defendant had a legitimate expectation of privacy during such processing, especially one recognized by society, a point defendant does not attempt to argue. As to the legality of the police conduct, it is clear that there existed sufficient probable cause for the defendant's arrest as he surrendered himself to the police, again

a point he does not challenge. In fact, the taking of fingerprints, palm prints and photographs of a felony arrestee is specifically authorized by statute (CPL §160.10(3)) and has been characterized as minimally intrusive by the Supreme Court (See Kirby v. Illonois, 406 US 682; United States v. Wade, 388 US 218 (1967); Schmerber v. California, 384 US 757 (1967)). As such, the defendant has neither standing nor a legal basis upon which to claim any Fourth Amendment violation.

As to defendant's Fifth Amendment argument, again he asks this Court to consider the arrest photographs as testimonial evidence, and therefore, under the protection of the Fifth Amendment. This Court reiterates its refusal to deem physical characteristics as testimonial evidence. As such, the Fifth Amendment privilege does not apply, for it is a bar against compelling communications or testimony and is not biolated by the compulsory exhibition of physical characteristics (See Schmerber v. California, supra, p. 764; People v. Peters, 135 AD2d 841 (2d Dept. 1987)).

Finally, defendant argues that his Sixth Amendment privilege was violated because his attorney was not present during the taking of his arrest photographs. The Sixth Amendment entitles a defendant to an attorney during a critical stage of a criminal proceeding and the opportunity for a meaningful confrontation of any witness therein. However, arrest processing is not deemed a critical stage of the criminal process, and therefore, defendant's right to counsel is not mandated during such (Gilbert v. California, 388 US 263 (1967)).

Accordingly, defendant's motion to supress the use of the arrest photographs is DENIED.

SEVERANCE

Defendant moves to server his case from that of his codefendant, Ryan Wagner, on the ground that he anticipates antagonistic defenses based on the statement given by Mr. Wagner to the police at the time of his arrest.

The People oppose defendant;s motion and argue that such is premature.

Two or more defendants may be jointly charged in a single indictment provided that all the offenses charged are based upon the same criminal transaction (CPL §20040(1)(c)). An application for severance is to be made pre-trial and is addressed to the sound discretion of the trial judge (People v. Cardwell, 78 NY2d 996(1991); People v. Chaplin, 181 Ad2d 828, lv. denied, 79 NY2d 1047 ((1992)). Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, the conflict alone would lead the jury to infer defendant's guilt (People v. Mahboubian, 74 NY2d 174 (1989)). However a defendant's assertion that a codefendent may offer a defense antagonistic to him does not, in and of itself, constitute "good cause" to grant a severance (People v. Lerner, 122 AD2d 813 ((2d Dept 1986)). Where a statement is concerned, it is only when the amtter contained in one defendant's statement, inculpatory of a codefendant, cannot be delete effectively that the trial court should grant a severance (People v. Turner, 110 AD2d 974 (3d Dept. 1985)).

This matter, as well as that of the codefendant, Ryan Wagner, is still in the motion stage of the proceedings, There

has yet to be any exploration of defenses or of the legitimacy of any statement allegedly given to police, much less the redaction thereof. As such, the granting of severance by this Court, at this stage, would be premature (See, People v. Russell, 71 NY2d 1016 ((1988)).

Accordingly, defendant's motion for severance is DENIED at this time, but this issue shall be revisited at a more appropriate time.

EXEMPLAR EVIDENCE

The People move for an Order requiring the defendant to submit to the taking of hair, saliva, and blood samples, and to pose for photographs pursuant to CPL §240.40 (2)(b)(iv)(v).

The defendant opposes the People's motion and argues that the People have failed to meet the burden mandated by statute for the taking of such exemplars and how such are relevant. Defendant further reiterates his earlier Fifth Amendment argument.

Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment is pending may order the defendant to provide non-testimonial evidence, requiring the defendant to pose for photographs not involving reenactment of an event and to submit to the taking of blood, hair, and saliva samples (CPL §240.40 (2)(b)(iv)(v)).

This Court can not see how the comparison of this defendant's involvement in the crime. Further the photographs of the defendant's allegedly racist tattoos seem relevant to this defendant's possible motive for having committed the crime,

especially in the light of the nature of the charges contained in the indictment. As stated above, the taking of said samples does not violate this defendant's Fifth Amendment constitutional privilege against self incrimination.

Accordingly, the People's motion is GRANTED, and the Order submitted shall be signed forthwith.

LEAVE TO MAKE FURTHER MOTIONS

Defendant requests leave to make any further motions as may be necessary, for he has yet to review a voluminous amount of material, and the facts and circumstances not now within his knowledge may warrant such.

The People oppose defendant's request should he fail to comply with the applicable statute.

The Court must entertain and decide on merits, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the forty-five day period after arraignment. However, any other pre-trial motion made after the forty-five day period may be summarily denied (See CPL §255.20 (1), (2), (3)).

Accordingly, defendant's motion is DENIED at this time, but the issue shall be revisited if future motions are submitted.

The above memorandum constitutes the decision and order of this Court

So Ordered:

Dated: 2/26/2001

S/_____
Charles F. Cacciabaudo
County Court Judge

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

v.

CHRISTOPHER SLAVIN,

Defendant.

----------X

By: HON. CHARLES F. CACCIABAUDO
J.C.C.

Case No: 2452A-00

HON. JAMES M. CATTERSON, JR. ESQ.
Suffolk County District Attorney
By: EILEEN A POWERS, ESQ.
Arthur M. Cromarty Court Complez
200 Center Drive
Riverhead, NY 11901

ROBERT J. DEL COL, ESQ.
Attorney for Defendant
34 Dewey Street
PO Box 1850
Huntington, NY 11743

* * * * * * * * * * * * * * * * * * *

This defendant stands charged with two counts of Attempted Murder in the Second Degree, Assault in the First Degree, Assault in the Second Degree, and two counts of Aggravated Harassment in the Second Degree.

On July 24, 2001, this defendant submitted a motion in limine to be considered by the Court. As such motion was made on the ever of trial, the People did not have the opportunity to submit a written response, as jury selection was to begin on July 26, 2001. To avoid further delay of the trial, this Court heard oral arguments and ruled from the bench, promising a more formal decision to follow. This is such decision and it is to be filed with the court file.

TATTOOS

This defendant moved this Court to preclude the People from admitting testimony and photographs of allegedly racist tattoos into evidence at the time of trial in that such are irrelevant and prejudicial.

The People opposed the defendant's motion and relied on this Court's decision dated February 26, 2001, addressing this issue.

As stated on the record, this Court determined that all evidence of allegedly racist tattoos would be admissible at the time of trial in that such are relevant to this defendant's possible motive for having committed the crimes of Aggravated Harassment in the Second Degree, as charged in the indictment.

SANDOVAL

Defendant moved to suppress any evidence of prior convictions during his cross examination should he choose to testify at the time of trial.

The People opposed and requested permission to cross examine the defendant on prior misdemeanor convictions involving giving false statements to authorities under the penalty of perjury; a harassment charge involving his ex-girlfriend; and an assault charge involving other individual.

This court permitted the conviction of providing false information to authorities in that the defendant clearly placed his interests above those of society. As to the other charges, htis Court permitted the questioning of having been convicted of a crime, without the nature of the charges being mentioned, as such are similar enough to the crimes contained within this indictment to risk being prejudicial.

Accordingly, defendant's motion is DENIED.

The above memorandum constitutes the decision and order of this Court.

SO ORDERED:
Dated: 9/10/01

S/_____
CHARLES F. CACCIABAUDO
County Court Judge

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

1875f
Y/mv
Argued October 31, 2002
------AD2d------

2001-10008
The People, etc., respondent,
v. Christopher Slavin, appellant.
(Ind. No. 2452/00)

Robert J. Del Col, Huntington, N.Y., for appellant

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Patricia A. Murphy, Steven A. Hovani, Michael Blakey, and Glenn Green of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Cacciabaudo, J.), rendered October 4, 2001, convicting him a attempted murder in the second degree (two counts), assault in the first degree, assault in the second degree, and aggravated harassment in the second degree (two counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant contends that the evidence adduced at trial was legally insufficient to prove his guilt beyond a reasonable doubt. As the defendant made only generalized

motions for a trial order of dismissal, this contention is not preserved for appellate review (*see People v. Gray,* 86 NY2d 10). The defendant's post-verdict motion to dismiss the indictment pursuant to CPL 330.30, in which he raised essentially the same argument that he now raises on appeal, was not sufficient to preserve this contention for appellate review (*see People v. Padro,* 75 NY2d 820). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 NY2d 620), we find that is was legally sufficient to establish the defendant's guild beyond a reasonable doubt.

The defendant's remaining contentions are without merit.

SANTUCCI, J.P., McGINITY, LUCIANO and SCHMIDT, JJ., concur.

Enter:

James Edward Pelzer
Clerk

November 18, 2002

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE
Chief Judge

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

v.

CHRISTOPHER SLAVIN,

Defendant.

----------X

ORDER GRANTING LEAVE

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceeding herein * questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at New York, New Yorok
June 11, 2003

s/_____
Chief Judge

* *Description of Order:* Order of the Appellate Division,

Second Department, entered November 18, 2002, affirming a judgment of the County Clerk, Suffolk County, rendered October 4, 2001.

Court, testified as follows:

THE CLERK: Please be seated.

Please state your full name for the record.

THE WITNESS: Louis Jordan.

THE CLERK: And, Mr. Jordan, do you have a rank?

THE WITNESS: Sergeant.

THE CLERK: And who is that with?

THE WITNESS: The Monmouth County Prosecutor's Office in New Jersey.

THE CLERK: Do you have a shield number?

THE WITNESS: No shield number.

THE CLERK: Thank you.

THE WITNESS: You're welcome, sir.

THE COURT: Mr. Jordan, I want you to keep your loud enough so the last juror in the box can hear you.

If you don't understand a question put to you by the attorneys, please let me know that. I'll have them repeat and rephrase the question

If you hear the word objection, stop in your testimony until I make a ruling.

Okay?

THE WITNESS: Yes, sir.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MS. POWERS:

Q. Good afternoon, detective.

A. Good afternoon, ma'am.

Q. By whom are you employed?

A. By the Monmouth County Prosecutor's Office in New Jersey.

Q. And how long have you been with them?

A. Approximately fourteen years.

Q. And can you tell me what you do for them.

A. I am a chief investigator for the Bias Crime and Community Relations Unit.

Q. And can you tell the jury some of your duties as the chief of those units.

A. My job is to actively investigate any suspected or confirmed offenses or unlawful act which has been perpetrated against a person and/or property based in part on their race, religion, gender, disability or sexual orientation.

Q. And when you refer to gangs in your title. What specifically are you referring to?

A. I'm referring to motorcycle groups, motorcycle gangs, street gangs, prison gangs, white supremist gangs, Klan

and any group to the extreme Reich.

Q. And when you say white supremist gangs or groups, who are you talking about there?

A. I'm referring to groups such as Christian Identity movement –

MR. DEL COL: Objection, Judge.

THE COURT: This is – all right. He's not going to be able to testify with regard to Christian Identity movement.

The jury's to disregard the last answer. Proceed.

Q. And can you tell the jury something about your formal education.

A. I hold a Masters Degree in criminal justice which I obtained from Hamilton University. I also hold a Bachelor's Degree in cultural studies also from Hamilton University.

Q. And have you – in addition to your formal education, have you had additional education in the areas of hate groups and white supremacy groups?

A. Yes, I have.

Q. And can you begin to tell the jury something about that education.

A. I will.

I was trained by the – while serving in the United States Army on active duty, I received training and later became a team leader of a group called the Sniper

Conversion Team. It's an elete group of the United States Army that are specially trained to monitor, track and observe terrorist groups, both foreign and domestic. The domestics groups would be anything that's located within the jurisdictional walls of the United States such as – groups such as the Klan and groups of that nature, hate groups, White Power groups.

Q. And other than your training with the Army have you had other additional education in this area?

A. I had other additional training with regards in this training by the New Jersey State Police and their criminal investigative division in which I've received, gracious, approximately forty hours with them just in the area of street gang and hate group identification.

If I may refer to my notes. I have a lot.

Q. Yes.

A. I've also been trained by MGLOCLEN. And MCLOCLEN is the Mid-Atlantic Great Lakes Organized Crime Network Law Enforcement Network in which I received training from them over the past several years with respect to hate groups, their identifications, tattoos, signs, symbols and their philosphy.

I've also received training from the joint from New Jersey College – I'm sorry – and that conference was sponsored by governments from inside and outside the United States, across this country with regard to hate groups and terrorist groups in and outside United States. And that was a hand picked – every one who attended that particular conference are hand picked to

attend. Approximately 300 law enforcement officers in general.

I've also been cross-trained by the New Jersey State Police in New Jersey with regards to hate groups and other types of gangs, if you will, again in terms of their identification, tattoos, signs and philosophies.

I've also been cross-trained by the Attorney General's Office in the State – State of New Jersey with regard to hate groups in which the Attorney General put on a number of conferences reference to hate groups and typical street gangs.

Q. And have you lectured in the – in the area – the area of white supremacy and hate groups in the past?

A. Yes, I have.

If I may.

Q. Yes, I want you to tell the jury something about those lectures.

A. I've lectured for the United States Army, CID and MICID is the Criminal Intelligence Division and also the MI Division, which is the Military Intelligence Division of the United States Army. I've bee lecturing for them for a number of years both at Fort Hamilton and Fort Dix where my area of speciality is focusing in on hate groups, their identification of tattoos, signs and things of that nature.

I've also trained the Attorney General – for the Attorney General, State of New Jersey, assembled his cabinet to raise conscious awareness on this issue of gangs and hate groups in the State of New Jersey and to

determine what that treat level was to the State of New Jersey. So I've been involved with that as well.

Again, with MGLOCLEN. Also the Mid-Atlantic Great Lakes Organization on Law Enforcement Crime Network. I've been involved with them on a number of seminars across this country with regards to teaching in this subject matter of both gangs and hate groups in the United States.

I've also trained with the Fort Dix CID branch when Fort Dix was active. CID is, again, the criminal intelligence division who are the military – who are the military detectives. I've been cross-trained and trained that particular group with respect to the identification of hate groups and street gangs overall because they were experiencing problems with a number of hate groups coming into the military and causing problems.

I've also trained the United States Navy, Department of Warfare with regards to hate groups. This was done at the Naval base in Lakehurst, Lakehurst, New Jersey and in which I was asked to come in by their joint chief to help and assist them with a problem that they had ongoing with regards to graffiti that was located in and around the installation and afterward to provide a seminar to raise conscious awareness on this subject matter.
Bear with me just a minute.

I've been asked by the United States Department of Justice to assist them in training. They conducted a two day – three day training in Mt. Claire, New Jersey, The U.S. Department of Justice assembled all the local and federal law enforcement agencies into the Montclair

area and I was their keynote presenter to speak and address on hate groups conference – two to three day conference.

I was also asked by the Federal Bureau of Investigation, the F.B.I., Federal Bureau of Investigation assembled all their agents in the State of New Jersey and then later the Tri-state area, which includes New York, New Jersey and Pennsylvania to assemble for a conscious awareness on how to interview conduct interrogations and debriefings with regards to hate groups and their tattoos, affiliation and philosophy in the state of New Jersey and the tri-state area of New York, New Jersey and Pennsylvania.

I've also lectured in the United States, Virgin Islands for the for the U.S. Department of Justice. I've been over there for the past five years. This is the first year I didn't go, unfortunately, because of some other things that were pressing. But I've lectured for them on a number of occasions, again, with regards to this issue of hate groups and street gangs and how it affects their borders,

I was requested to come back several times by the then Governor Farley of the U.S. Virgin Islands. I've also helped and trained FLETS, which is the Federal Law Enforcement Training System with regards to this issue of hate group. We helped to draft policy which is not being used nationwide by all law enforcement in the country with regards to bias hate crime. As a result of helping to draft that policy, I've also been asked to teach during that same time and raise conscious awareness of this issue; again, identify tattooism,

symbols, White Power issues and white supremacy groups, which was done.

I've also spoke at – for the past eight years MGLOCLEN. As I stated earlier, they hold a national confernece each year down in Baltimore, Maryland. This is the Big E Conference which brings in law enforcement officers from all over the world and their attendees are – normally somewhere in the area of eight to nine hundred attendees show up at this conference. For the past eight years, I've always been their key presenter when it comes down to hate groups and white supremist groups that are operating. And to raise conscious awareness, once again, identify tattoos and things of that nature.

THE COURT: Move on to another area, please.

Q. Yes.

Sergeant, can you tell the jury something about your practical experience with white supremacy groups and hate groups.

A. My practical experience deals directly with –

MR. DEL COL: Judge, –

A. -- hate groups in that I conduct interviews, I conduct assessments of the groups in certain areas. It requires me to conduct surveillance and debriefings with regards to these particular groups.

Q. Can you tell the jury what a debriefing is.

A. There are two types of debriefings that we do. One is formal debriefing that we conduct and that formal debriefing is something that is normally done when the Court of that individual's attorney says my client wants– wishes to get out of the gang and no longer wish to associate. At that time that individual comes to my office, he sits down or she sits down and gives us a formal statement, everything they can tell us about that group. And my job then is to report back as to whether or not that particular assessment or, shall I say, that particular debriefing was accepted or not.

The second part of it is what we refer to as a street debriefing where I actually go out into the impact area where these groups are known to hang out and associate and to attempt to identify by observation or experience based on education the weakest link in that group and to try to interview that particular individual and to give him or her to give us information that affiliates directly with that group, such as the tattoos that he or she may be displaying on their body or t-shirt she may be wearing, the type of boots that they may be wearing, the color, if you will, of the shoelaces that they may, the suspenders that they may be wearing, the graffiti that may be the background where they're standing.

Q. And do you have any professional affiliations or associations in this area?

A. Yes, I do.

If I may.

I'm currently the vice-president of the National Gang Network. And the National Gang Network is located

out of Boston, Mass. It's current president is Lawence Jones. That organization works very closely with the southern Pover Law Center in Alabama tracking hate groups across the country.

I am currently the national president for the National Alliance of Hate Crime Investigators and District Attorney's Association in the United States. We act as a cleaning house for all investigators around the United States on the issue of hate crimes and hate groups.

I also serve as a member of the California Gang Network which is a tracing network and intelligence sharing network across the country.

I also serve as a member of the East Coast Gang Officers Association which focuses in and zeroing in on street gangs operating along the eastern seaboard.

Also a member of the National Alliance of Gang Investigators which is a part of this association as well, and I've been a member of that association for a number of years.

Also, a member of TMJ Bias Crime and Gang Officers Association in the State of New Jersey which is under the New Jersey Attorney General's Office. I've been a member of that organization since it's inception, which is approximately seven to eight years.

I'm also the - I'm also currently the sitting vice-president of the New Jersey Bias Crime Officers Association and the president - current sitting president of the Monmouth County Bias Officers and Gang Officers Association for the State of New Jersey and the County of Monmouth.

Q. Have you testified in Court as an expert in the area of hate groups and white supremacy in the past.

A. Yes, ma'am, I have.

Q. Can you tell the jury where you've testified in Court.

A. I've testified in the State of New Jersey, County of Ocean Township of Tom's River as an expert in the area of white supremacy groups and street gangs.

I've also testified – again, referring to my notes if I may – testified with regards to my notes if I may – testified with regards to skinheads and the Town of Oceanport State of New Jersey on – specifically in the area of tattoos and white supremist groups as it relates to their affiliation and the identifying of symbols and tattoos on their body.

Also testified before the Grand Jury and the superior court within our own State of New Jersey with regards to on numerous times, three different occasions, in '91, '92 and '93 with regards to specifically white supremist groups , their affiliation, tattoos, signs and symbols.

Testified in Dedham, Massachusetts and Boston – I'm sorry – in Massachusetts with regards to a hate crime incident that took place up there in which a skinhead was attacked – I'm sorry - an individual was attacked by a group of skinheads on a college campus and I was called in specifically to testify about the tattoos that were located on the individual's body.

Q. In addition to being recognized as an expert in those courts, have you been recognized or testified as an expert in any other forums?

A. Yes, I have.

Q. Can you tell the jury something about those.

A. Just bear with me just a minute.

I've testified in a number of disciplines with regards to this issue and been recognized as such.

One minute, please.

I'm sorry, I have to refer to my notes because it's been so many.

Q. I'm going to direct you attention to page 27.

A. I testified in the State of New Jersey for the New Jersey State Commission of Investigation. The State of New Jersey conducted a two- three days of hearings specifically on recognized street gangs, African-American Veets-Freets (phonetic spelling) and white supremist gangs as they found they were a threat to the State of New Jersey.

These hearings were conducted, again, by the State Commission of Investigation with which I was called in as their expert to discuss specifically the white supremist groups as it relates to their tattoos, signs and symbols that the utilize and what threat they were perceived as by the State of New Jersey.

I was also called in to act as a consultant for the U.S. Department of Justice and the Office of OJDDP, which is the Office of Juvenile Justice and Deliquency Prevention. With that particular department, I have to go through what I refer to as like a murder board, a murder board in that I am required to stand before

experts of U.S. Department of Justice and they, in turn, spontaneously ask me questions about anything dealing with hate groups, signs, symbols and things of that nature and as a result of that I must, to their satisfaction, identify successfully what it is and after which I am declared by the U.S. Department of Justice as an expert, which I was.

I've also been with the – and certified by the Attorney General Robert DelTuffo for the State of New Jersey with regards to street gangs. I've served actively on their committee since 1991 on that issue and continue to do so.

I've been recognized by the U.S. Department of Justice in the Federal Bureau of Prisons in Washington, D.C. with respect to this issue of street gangs and white supremist groups and White Power groups around the United States. I've been actively involved with that and continue to serve as an active member to them.

Testified for the New Jersey Commission on Racism and Racial Violence and – in February of '93 and have served actively after testifying on several subcommittees for the governor. To that end, again, with regards to hate groups and white supremist groups and White Power, which is basically the same in the State of New Jersey as well as for the United States Army and the United States Navy– Department of the Navy with regard to hate groups as well.

THE COURT: Miss Powers, do you want more or do you have enough?

Q. Have you been recognized as an expert in some forum

in New York?

A. Yes, I have.

I've been recognized by the New York State Police and also MGLOCLEN branch with regards to being an expert in the area of street gangs, most recently this year and for the past four years by the New York State Police in which I conduct training for them in the area of hate groups and hate gangs and prior to doing so I have meet with the New York State Police supervisors, captains and above at which time they again ask spontaneous questions that I must meet satisfactory to that end and afterward they declare by virtue of war that I'm allowed to speak before their police recruits to give expert opinion with regards to hate groups, which I've successfully done for the past four years.

Q. Have you published with respect to your expertise with white supremacy and hate groups?

A. Yes, I have.

I published a first volume book of twenty volume book series entitled the American Focus on Gangs. The first volume focused on hate groups and the typical street gang. I am currently– even as we speak, I'm writing the second volume, a second series to this book of twenty.

Q. And have you received any awards or professional recognition in these areas?

A. Yes, I Have.

If I – I've been recognized by the United States Navy and the United States Department of the Army with regards to hate groups and gangs.

I've been recognized by the National Law Enforcement Institute in Boston with regard- and received awards in that area with regards to gangs as well.

On the 13th of next month, I will be receiving the National Humanitarian Award which is given out, comes out of Washington, D.C. by NCCJ, the National Conference of Christian and Jews. I will be receiving that award.

I've also received the distinguished awards from the New York State Police with regards to the area of white supremist groups and gangs.

MS. POWERS: Judge, at this time, I offer Sergeant Jordan as an expert in hate groups and white supremacy.

THE COURT: Thank you.

Mr. DelCol.

MR. DEL COL: Thank you, Judge.

(Whereupon, at this time, there was a sidebar conference, held out of the presence of the jury, at which time the following ensued:)

MR. DEL COL: Judge, I was under the impression that he was being offered as an expert on tattoos. Now he's being offered as an expert as hate groups and white supremacy.

MS. POWERS: I did everything exactly the same, Judge.

THE COURT: With regards to that, he's an expert with regard to white supremacy and hate

groups. This is what he was being offered for originally and the area we went into is tattoos.

Do you want to question this witness at this time?

MR. DEL COL: No.

THE COURT: All right.

(Whereupon, at this time, after the sidebar conference, the following ensued in open Court:)

VOIR DIRE EXAMINATION:

BY MR. DEL COL:

Q. Good Afternoon.

A. Sir, good afternoon, sir.

Q. Not a big believer in - very busy man, right?

A. I'm sorry. Pretty much so, yes, sir.

Q. Let me ask you this, you – you stated under oath before that you testified on three separate occasions in the State of New Jersey.

A. Three or four, yes, sir.

Q. Just so the record is clear, what were the names of those cases.

A. If I may refer to my notes.

Q. Sure.

A. I testified in the Ocean County Superior Court in New Jersey.

Q. No, no, the name of the case, People versus –

A. I don't recall the name, sir. You mean State versus?

Q. Yeah.

A. I do not know the name of the case, sir.

Q. You testified though, right?

A. Sir, yes, sir.

Q. You don't remember the name of the defendant?

A. Sir, no, sir. It's been too long, sir.

Q. Have you ever testified in any capacity other that a prosecution witness?

THE COURT: In a Court of law.

Q. In Court.

A. Sir, no, sir.

Q. And you are a cop, right?

A. I'm a police officer, sir.

Q. Right.

And you're employed by the Manmouth County Prosecutors Office.

A. Sir, yes, sir.

Q. And are you paid by the Monmouth County Prosecutor's Office as an on-staff expert?

A. Sir, I don't understand the question, sir.

Q. Are you – in the scope of your employment are you

employed as an expert on staff with the Monmouth County Prosecutor's Office?

A. Sir, yes, sir.

Q. You are.

You are employed not as a detective investigator but as an expert.

A. I am employed as a police detective sergeant.

Q. Right.

A. Who happens to have expert– experience in this field.

Q. Okay.

So my question then is, are you on staff as an expert in the employ of the Monmouth County Prosecutor's Office or are you on – paid as a detective investigator.

A. I am paid as a police detective sergeant, sir.

Q. And you have no recollection about the cases – the names of the cases you testified in New Jersey?

THE COURT: Asked and answered.

Q. How about Massachusetts?

A. Sir, no, sir.

MR. DEL COL: I have nothing further, Judge.

THE COURT: People have made a request for him to be declared as an expert.

What's your position?

MR. DEL COL: Judge, I will object on the ground stated

previously on the record. I don't believe there's a need to go into, now reincorporate all of testimony on the record as if they were fully set forth here.

THE COURT: Let the record reflect that Louis Jordan will be declared an expert in connection with hate groups and white supremacy and you'll be given instructions at the conclusion of the case on how you'll treat all expert testimony, specifically on whether you should accept it or not accept in more detail at the conclusion of the case.

Proceed.

MS. POWERS: Can I have the witness given the laser pointer.

(Witness receiving)

THE COURT: Can we have an indication what the witness is looking at at this particular time.

MS. POWERS: Yes, Judge.

Direct Examination

BY MS. POWERS: (Continued)

Q. Sergeant, you're being shown People's 22 in evidence, photograph of a tattoo.

Can you identify what's depicted in this tattoo and tell the jury, if any, of its significance.

A. Yes, ma'am.

The first thing that stands out if the colors red and black. The colors red and black alludes to Hitler's Nazi Germany. I then notice and observe squares which are located at the three, six, nine and twelve o'clock position. The three, six, nine and twelve o'clock position clearly indicates that is what appeared to be a Celtic or Keltic cross. One of the interesting things to note is that normally that line moves horizontal and vertical, they're all connected but in this case it is not. Within that three, six, nine and twelve o'clock position we also see the swastika. We notice that the swastika is turned a certain way which clearly indicates that it again alludes to Nazi Germany and Hitler's Third Reich. Also within that swastika we see the White Power fist and it alludes to White Power. Pure white race and outside that, if you look between the red and the black, you see this White Power border or and you can look at the entire circle itself and what that alludes to is the protection of White Power and the white supremacy movement.

Q. Thank you.

Sergeant, you're going to be shown now People's 21 in evidence. It's also a photograph of a tattoo.

Can you identify for the jury what's depicted in that tattoo and tell the jury, if any, it's significance.

A. First, looking to our right we have a caricature of what appears to be a kneeling Jew and in that he is wearing a long black coat. Sticking out of his pocket appears– it's money. He is wearing – his nose has been exaggerrated

and extra long. He's wearing a beanie-type cap which I'm – which is actually his yarmulke, which has been turned into a beanie, with a propeller on its top. Located to the left and approaching him is a typically dressed skinhead in that he is wearing a pair of Doc Martin boots, also referred to as Doc's.

In London and England where this group originated from, you get these boots absolutely free if you are on state aid. Here in the United States those same boots will cost you anywhere from $85 to $150 for the exact same boot. They are manufactured by Doc Martin. And that's the same on the bottom.

We then also notice the steel toes which stand out on the boot. We then observe that he's wearing a pair of blue jeans typically rolled up above the top of the Doc's. Then we notice that he's wearing a pair of suspenders and those suspenders are color coded red, yellow, white, green, and black and in this case, it appears that he's wearing a pair of red suspenders and the red suspenders allude to the fact that he is an Oi! Skinhead, O-i with an exclamation mark, that he is basically into it for the heavy metal music, that White Power type music, that hate music that we sometimes hear. He's also wearing a leather type jacket typical of a skinhead. He's wearing – carrying in his left hand an ax and in his right hand a bottle of alcohol. He has a sinister- type clown look on his face as he is rapidly approaching the kneeling Jew.

Q. Sergeant, you're going to be shown People's 32 in evidence. It's also a photograph of a tattoo.

A. One –

Q. Can you identify for the jury what's depicted in that and tell them its significance.

A. Yes.

The first thing that stands out here, as we see again, is these colors red and black, again, referring to Nazi Germany – excuse me – and Hitler's Third Reich. We then notice the F period, T period , W period, which means fuck the world. It is a common term or common letters that we see which are used by prison gangs, street gangs, white supremist groups.

THE COURT: Mr. Jordan, I just see F.T. It doesn't look like W. It's not a F?

THE WITNESS: It's F.T.W., Your Honor.

THE COURT: Alright. F.T.W.

A. Was – will you please –

Q. That's okay.

A. The letter F period, T period, W period, which means fuck the world. It is typical lettering which is found amongst white supremist groups, prison gangs, street gangs.

Above that, we see what appears– what is an X and inside the X is the letter NY and HC. The NY is New York. The letter HC is hard-core, sometimes referred to as hate core.

The letters hard-core derive from a punk rock band within the City of New York. This hard-core punk rock band, the group itself it was a movement by punk rockers who basically got into this type of music and in

your early late seventies, early eighties skinheads locked in on this type of music because it later changed and became heavy metal, they changed the lyrics to that of hate and White Power and they were attracted to this music by the late eighties – mid-eighties, I should say, 1985, 1986 and as such, since then it's been a part of their drive to get involved with the heavy metal and White Power music.

Q. You're going to be shown People's Exhibit in evidence Number 23. This is also a photograph of a tattoo.

Can you identify for the jury what's depicted in this tattoo and tell the jury the significance, if any.

A. We're looking at the back of an individual's neck. The letters that you see are A period, C period, A period, B period. It derives from a heavy metal band. A Group identified as the Four Skins. That's the number four and the letter skins like skinhead. They produce an album entitled "The Good, the Bad and the Four Skins."

This particular– this particular initials are from that particular – the lyrics of the song, which is "All cops are bastards" and this phrase is repeated throughout the lyrics of that particular song, which is, again, produced by the Four Skins.

Q. Sergeant, you're going to be shown People's 28 in evidence, also a photograph of a tattoo.

Can you identify what's depicted in this tattoo and tell the jury its significance and meaning.

A. The first thing we notice is that there appears to be – in this area here it looks like either water or a cloud and

protruding up from this water or cloud is an arrow. This is actually known as a justice ruin, also known as a teawas (Phonetic spelling.) It is an ancient viking ruin. And a ruin in essence, is the viking alphabet used by the religious leaders and the justice ruin tells them that it brings about strength and purity and justice. If – their cause is just – you will start to see that certain group members will display this. The vikings displayed this a lot with regards to their weapons. You would see them when – prior to going into the battle, you will see these type of symbols located on their armory. Located just to the left you see what appears to be a typical viking ship and at the head is a typical dragon head, which is normally located at the front of viking ships traditionally. At the bottom is a Celtic Design known as an Infinity. There is no beginning and no end.

Q. You're going to be shown People's 30 in evidence. Can you identify what's depicted in that tattoo and tell the jury it's significance and meaning as depicted.

A. What we're looking at here is a typical viking ship and with the viking ship we see the typical – along the side is the viking shield which is normally seen. When they're being attacked, they kind of close these shields so they're not attacked, their ship in not personally attacked and down at the bottom you see the face of the viking, the strong warrior and the viking alludes to the pure white race because they consider themselves pure and white. They are the so-called chose people. And so for this reason a lot of white supremist groups follow the following of these vikings and, again, you see the continuation of the Infinity of – with regards to the Celtic ruin.

Q. You're now going to be shown People's 29 in evidence, also a photograph of the tattoo.

Can you identify what's depicted in that tattoo and explain its significance or meaning for this jury.

A. Yes, ma'am.

At the bottom you see – this appears to be a continuation of this Infinity Celtic ruin. As we get closer toward the top – in fact, if we look at the tip first we see the viking, he's blowing a traditional type - what appears to be a traditional type viking horn, which is a call to arms or a call to battle and right below him is the typical viking, okay, again and vikings are displayed in this manner for certain hate groups because of their purity of the white race and, as you can see from his arm their strenght and muscle mass therein which indicates – which is typical of the vikings, they're views as warriors and they're very significant to the White Power movement.

Q. Sergeant you're being shown People's 27 in evidence, also a photograph of a tattoo.

Can you identify what's depicted in that tattoo and tell this jury of it's significance or meaning.

A. Well, one of the first things I notice up in the left hand corner is the American flag and along with the American flag, just below that I see a swastika and that swastika appears located within a cloud. The swastika, a symbol of hate. Once again, when I look at this entire picture, it clearly sends a signal – I'm not exactly sure what this symbol looks like. It could be Celtic or Keltic cross here, I'm not exactly sure. Then I'm looking at a

typical skinhead, again, with a traditional shape head. And not all skinheads shave their heads. And also we notice that he's holding in his right hand a bat or a club. He is also holding back with his left hand an aggressive dog, which is traditional for skinheads a pitbull or a bulldog. But their dog of choice has always been a pitbull. And around the pitbull's neck we see a leather collar with spikes sticking out.

Q. Sergeant, you're being shown People's 25 in evidence, also a photograph of a tattoo.

Can you identify what's depicted in that tattoo and tell this jury, if any, it's significance and meaning.

A. Yes, ma'am.

This seems to be a continuation from the one you showed me previously in that, again, we see the American flag, we clearly see the cloud which surrounds and, of course obviously this symbol of hate, which is alluding to Hitler's Third Reich with regard to this swastika. We also see the American bald eagle. The eagle is perceived as a symbol of strength and power. Leading down we look and we see two lightning bolts and these lightening bolts are actually SS ruins. These SS ruins refer to Hitler's Secret Storm Troopers or his SS Troopers, if you will, which was his elite, specially trained, especially conditioned White Power group that he utilized and it also refers to skinhead security.

Just to the right of the SS we see a typical skinhead, once again, wearing his Doc Martin boots, wearing typical jeans rolled up above the Doc's an he's wearing his suspenders, also known as braces and he's bare-

chested. He's holding in his right hand what appears to be a torch or a bat or club which is inflamed. Behind him is what appears to be a Celtic- which it is – a Celtic or Keltic cross and the skinheads with his right foot appears to be standing on the skeletal remains of a human being and to the left it looks like, again, the head of a bunch of skeletal remains.

Q. Finally, Sergeant, you're being shown People's 26 in evidence. It's also a photograph of a tattoo.

Can you identify for the jury what's depicted in that tattoo and explain its significance or meaning, if any.

A. This seems to be a continuation of the one you showed me previously where– again, with the swastika in a cloud, the American bald eagle and, again, this SS ruin or lightening bold. These lightning bolts appear to be – come down and viking, the club or bat that this skinhead, again, is holding in his hand and, as such, this lightning or – is causing a fire or an explosion to hit this factory or city-type area and from this city or factory appears a rolling tank of power. This rolling tank of power is now crushing, if you will, the skull of humans.

Q. Thank you.

MS. POWERS: I have nothing further, Judge.

THE COURT: Cross-examination.

MR. DEL COL: Nothing, Judge.

THE COURT: Sergeant Jordan, thank you very much.

Please do not discuss your testimony.

(3)

No. 03-1666

Supreme Court, U.S.
FILED
JUL 19 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRISTOPHER SLAVIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION

STEVEN A. HOVANI*
Of Counsel to
THOMAS J. SPOTA
District Attorney of
Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2463

**Counsel of Record*
for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the constitutional guarantee of free expression prohibit governmental use of symbols of hatred tattooed on a criminal defendant's body?

No.

2. Once he surrendered, did petitioner have a constitutional right to prohibit photographs of tattoos on non-intimate areas of his body?

No.

3. Were petitioner's tattoos relevant to his intent to kill and motive for committing a hate crime?

Yes.

4. Can a trial court balancing the probative value of such tattoos against any unfair prejudice permit the prosecution to present expert testimony to interpret the racist symbolism?

Yes.

5. Did the prosecution's use of the tattoos, which were prior communicative statements voluntarily created by petitioner prior to being in custody, violate his privilege against testimonial self-incrimination when petitioner was neither forced to authenticate or explain them at trial?

No.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cases	iv
Preliminary Statement	1
Statement of Facts	1
Background	1
The Deception	1
The Victims	3
The Attack	3
Immediate Assistance	4
The Hospital	5
The Investigation	6
Evidence Analysis	7
Pre-trial Decisions	8
Trial	10
Mid-trial Hearing	15
The Expert	16
Sentence	18
Direct Appeal	18
Reasons Why The Petition Should Be Denied	19

TABLE OF CONTENTS – Continued

Page

I. The decision of the New York State Court of Appeals is in harmony with federal constitutional interpretation of the Fifth Amendment privilege against self-incrimination and the holding in *United States v. Hubbell*, 530 U.S. 27 (2000)..... 19

II. The decision of the New York State Court of Appeals is also in harmony with federal constitutional interpretation of the First, Fourth, Sixth, and Fourteenth Amendments..... 24

Conclusion..... 30

TABLE OF CASES

Page

CASES

Andersen v. Maryland, 427 U.S. 463 (1976) 21

Application to Quash a Grand Jury Subpoena Dated December 28, 1992, 157 Misc.2d 432 (Sup. Ct. N.Y. Co. 1993) 22

Arizona v. Fulminante, 499 U.S. 279 (1991) 30

Barclay v. Florida, 463 U.S. 939 (1983) 25

Barrett v. Acevedo, 143 F.3d 449 (8th Cir. 1998) 22

Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) 24

Boyd v. United States, 116 U.S. 616 (1886) 22

Chimel v. California, 395 U.S. 752 (1969) 28

Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354 (2004) 21

Commonwealth v. Romero, 1997 WL 1070445, 43 Va. Cir. 530 (Cir. Ct. Va. Fairfax Co. 1997) 29

Couch v. United States, 409 U.S. 322 (1973) 24

Cupp v. Murphy, 412 U.S. 291 (1973) 26

Curcio v. United States, 354 U.S. 118 (1997) 24

Dawson v. Delaware, 503 U.S. 159 (1992) 24, 25

Doe v. United States, 487 U.S. 201 (1988) 20, 22, 24

Fisher v. United States, 425 U.S. 392 (1976) 21, 22

Gilbert v. California, 388 U.S. 263 (1967) 23

Hoffa v. United States, 385 U.S. 293 (1966) 20

Holt v. United States, 218 U.S. 145 (1910) 20

Horton v. California, 496 U.S. 128 (1990) 28

TABLE OF CASES – Continued

Page

In re Grand Jury Proceedings (Johansen), 632 F.2d 1033 (3d Cir. 1980) 21

In re Grand Jury Subpoena Duces Tecum Dated December 14,1984, Y., M.D., P.C. v. Kuriansky, 69 N.Y.2d 732, cert. denied, 482 U.S. 928 (1987)..... 22

In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990, 741 F.Supp. 1059 (S.D.N.Y. 1990) 21

In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992, 1 F.3d 87 (3d Cir. 1993)..... 21

In re Layden, 446 F.Supp. 53 (N.D. Ill. 1978)..... 23

In re Vanderbilt (Rosner-Hickey), 57 N.Y.2d 66 (1982)..... 21, 22

Johnson v. United States, 228 U.S. 457 (1913)..... 21

Katz v. United States, 389 U.S. 347 (1967) 20, 25

King v. State, 29 S.W.3d 556 (Tex. Crim. App. 2000)..... 29

Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000)..... 27

New York v. Belton, 453 U.S. 454 (1981) 28

Oliver v. Middlebrooks, 402 F.2d 781 (5th Cir. 1968)..... 23

Pennsylvania v. Muniz, 496 U.S. 582 (1990)..... 20, 23, 24

People v. Aishman, 19 Cal. Rptr.2d 444 (Cal. App. 4 Dist. 1993) 30

People v. Allah, 84 Misc.2d 500 (Sup. Ct. Bronx Co. 1975)..... 27

People v. Alpern, 217 A.D.2d 853 (2d Dept. 1985) 24

People v. Archibald, 269 A.D.2d 682 (2d Dept.), lv. denied, 92 N.Y.2d 880 (2000)..... 28

People v. Baez, 131 A.D.2d 687 (2d Dept. 1987) 10

TABLE OF CASES – Continued

Page

People v. Bagley, 183 Misc.2d 523 (Sup. Ct. N.Y. Co. 1999) 26

People v. Barclay, 201 A.D.2d 952 (4th Dept. 1994) 28

People v. Beckwith, 303 A.D.2d 594 (2d Dept. 2003) 21

People v. Belton, 55 N.Y.2d 49 (1982) 28

People v. Berg, 92 N.Y.2d 701 (1999) 20, 24

People v. Boudreau, 115 A.D.2d 652 (2d Dept. 1985) 23

People v. Chiagles, 237 N.Y. 193 (1923) 27

People v. Colavito, 87 N.Y.2d 423 (1996) 24

People v. Copicotto, 50 N.Y.2d 222 (1980) 21, 24

People v. Cwikla, 46 N.Y.2d 434 (1979) 27

People v. DeSantis, 46 N.Y.2d 838, cert. denied, 443 U.S. 912 (1979) 28

People v. DiBella, 277 A.D.2d 699 (3d Dept. 2000), lv. denied, 96 N.Y.2d 758 (2001) 10, 26

People v. Evans, 43 N.Y.2d 160 (1977) 27

People v. Fitzpatrick, 32 N.Y.2d 499 (1973) 22

People v. Gallina, 110 A.D.2d 847 (2d Dept. 1985) 26

People v. George, 227 A.D.2d 316 (1st Dept. 1996) 10

People v. Grokey, 60 N.Y.2d 309 (1983) 27

People v. Hager, 69 N.Y.2d 141 (1987) 20, 24

People v. Herr, 203 A.D.2d 927 (4th Dept. 1994), aff'd, 86 N.Y.2d 638 (1995) 28

People v. Holmes, 304 A.D.2d 1043 (3d Dept. 2003) 20

People v. Howard, 90 Misc.2d 662 (Sup. Ct. N.Y. Co. 1977) 26

TABLE OF CASES – Continued

Page

People v. Huntley, 15 N.Y.2d 72 (1965) 29

People v. Johnson, 88 Misc.2d 749 (Co. Ct. Onondaga Co. 1976) 26

People v. Killian, 74 Misc.2d 120 (Co. Ct. Nassau Co. 1973) 26

People v. King, 232 A.D.2d 111 (2d Dept. 1997) 28

People v. Levan, 91 A.D.2d 384 (1st Dept. 1983) 28

People v. London, 124 A.D.2d 254 (3d Dept.), lv. denied, 68 N.Y.2d 1001 (1996) 26

People v. Lord, 104 Misc.2d 150 (Crim. Ct. Kings Co. 1980) 26

People v. Mars, 266 A.D.2d 316 (2d Dept. 1999) 21

People v. Marsh, 20 N.Y.2d 98 (1967) 28

People v. Mineo, 85 Misc.2d 919 (Sup. Ct. Kings Co. 1980) 27

People v. Natal, 75 N.Y.2d 379 (1990) 27

People v. Patterson, 78 N.Y.2d 711 (1991) 26

People v. Perel, 34 N.Y.2d 462 (1974) 27

People v. Peters, 135 A.D.2d 841 (2d Dept. 1987) 9, 23, 26

People v. Ramirez-Portoreal, 88 N.Y.2d 99 (1996) 27

People v. Randt, 142 A.D.2d 611 (2d Dept. 1988) 26, 28

People v. Rios, 171 A.D.2d 582 (1st Dept. 1991) 10

People v. Rodriguez, 167 A.D.2d 326 (1st Dept. 1990) 10

People v. Rodriguez, 64 N.Y.2d 738 (1984) 10

TABLE OF CASES – Continued

Page

People v. Rosario, 136 Misc.2d 445 (Crim. Ct. Bronx Co. 1987) 22

People v. Rumph, 128 Misc.2d 438 (Sup. Ct. Kings Co. 1985) 26

People v. Sallow, 100 Misc. 447 (Ct. Gen. Sess. N.Y. Co. 1917) 27

People v. Scarola, 71 N.Y.2d 769 (1988) 23

People v. Sirmons, 242 A.D.2d 883 (4th Dept. 1997), lv. denied, 92 N.Y.2d 1038 (1998) 21

People v. Siu Wah Tse, 91 A.D.2d 350, lv. denied, 59 N.Y.2d 679 (1983) 16

People v. Skinner, 53 P.2d 720 (Colo. Ct. App. Div. V, 2002) 29

People v. Slavin, 299 A.D.2d 499 (2d Dept. 2002) 18

People v. Slavin, 100 N.Y.2d 566 (2003) 19

People v. Slavin, 1 N.Y.3d 392 (2004) 19

People v. Smith, 59 N.Y.2d 454 (1983) 28

People v. Smith, 86 A.D.2d 251 (3d Dept. 1982) 23, 26

People v. Spruill, 299 A.D.2d 374 (2d Dept. 2002) 21, 28

People v. Stith, 69 N.Y.2d 313 (1987) 22

People v. Suarez, 298 A.D.2d 218, lv. denied, 99 N.Y.2d 565 (2002) 23

People v. Taylor, 294 A.D.2d 825 (4th Dept. 2002) 28

People v. Tejada, 93 N.Y.2d 963 (1999) 27

People v. Torres, 291 A.D.2d 273 (1st Dept.), lv. denied, 98 N.Y.2d 681 (2002) 26

TABLE OF CASES – Continued

Page

People v. Turiago, 90 N.Y.2d 77 (1997) 22

People v. Walls, 277 A.D.2d 959 (4th Dept. 2000), lv. denied, 96 N.Y.2d 808 (2001) 26

People v. Weintraub, 35 N.Y.2d 351 (1974) 28

People v. Whitaker, 64 N.Y.2d 347, cert. denied, 474 U.S. 830 (1983) 26, 27

People v. Williams, 170 A.D.2d 552 (2d Dept.), lv. denied, 77 N.Y.2d 1002 (1991) 26

People v. Witherspoon, 27 Ill.2d 483, 190 N.E.2d 281 (Sup. Ct. Ill. 1963) 30

Prudential Securities v. Brigianos, 233 A.D.2d 18 (1st Dept. 1997) 22

R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992) 24

Rochin v. California, 342 U.S. 165 (1952) 27

Schmerber v. United States, 384 U.S. 757 (1967). 9, 20, 23, 27

State v. Bowden, 113 R.I. 649, 324 A.2d 631 (Sup. Ct. R.I. 1974) 30

State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (N.C. Ct. App. 1981) 30

State v. Macias, 481 So.2d 979 (Dist. Ct. App., 4 Dist., 1986), aff'd, 515 So.2d 206 (Sup. Ct. Fla. 1987) 30

State Medical Lic. Bd. v. Brady, 492 N.E.2d 34 (Ct. App. Ind. First Dist. 1986) 25

State v. Novak, 949 S.W.2d 168 (Mo. App. 1997) 29

State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 30

TABLE OF CASES – Continued

Page

State v. White, 348 S.C. 532, 560 S.E.2d 420 (Sup. Ct. So. Cr. 2002) 25

Texas v. Johnson, 491 U.S. 397 (1989) 24

United States v. Dionisio, 410 U.S. 1 (1973) 23, 26

United States v. Esdaille, 769 F.2d 104 (2d Cir. 1985) 23

United States v. Hubbell, 530 U.S. 27 (2000) 19, 20, 22

United States v. Robinson, 414 U.S. 218 (1973) 27

United States v. Wade, 388 U.S. 218 (1967) 9, 23, 26

Winston v. Lee, 470 U.S. 759 (1985) 27

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 24, 25

Yarkew v. Sinclair, 495 F.Supp. 1248 (D. Minn. 1980) 25

PRELIMINARY STATEMENT

This brief is in opposition to a petition for certiorari to the New York State Court of Appeals from a decision dated February 7, 2004, which affirmed an Order and Memorandum Decision of the Appellate Division of the Supreme Court, Second Department, entered November 18, 2002, which affirmed petitioner's criminal conviction for two counts of Attempted Murder in the Second Degree, one count of Assault in the First Degree, one count of Assault in the Second Degree, and two counts of Aggravated Harassment in the Second Degree, after jury trial, in the County Court of Suffolk County (Cacciabaudo, J.). On November 18, 2002, petitioner was sentenced to three indeterminate and concurrent terms of imprisonment from twenty-five years to life on the first three counts, and concurrent terms of seven years, one year and one year on the remaining three counts. He is currently incarcerated at the Clinton Correctional Facility in Dannemora, New York. Petitioner's codefendant, Ryan Wagner, is also currently imprisoned, after his separate trial similarly resulted in conviction.

STATEMENT OF FACTS

Background

On September 17, 2000, a vicious assault on two Mexican immigrants fortunately did not result in their death. But the severity of the unprovoked attack upon them cannot be seriously questioned. The Court properly allowed the jury to consider photographs of petitioner's tattoos, taken after his surrender, because they were relevant to his motive for choosing to isolate and nearly kill two Mexican day laborers. No federal constitutional rights were violated in obtaining this conviction and certiorari should be denied.

The Deception

On September 17, 2000, around 6:15 a.m. in Farmingville, New York, Magdaleno Estrada Escamilla and Israel

Perez Arvizu were home asleep. One of their housemates, Mario Mendoza, had work lined up for that day and was waiting for his prospective employer to pick him up at the 7-Eleven store. Two people in a car told him they were looking for two workers (257).[1] During Mendoza's conversation with the petitioner, who was not driving, Mendoza mentioned that some of his housemates could work that day. Petitioner suggested that Mendoza come with them in the car and show them the house.

Mendoza entered the car through the rear passenger side door and the car door stuck a bit so he had to pull hard to open it (259). They drove to his nearby house and Mendoza went inside to see if any of his friends wanted to go to work. The second person he asked was Estrada, who agreed to go. He then woke up Perez. After a brief conversation between Perez and Estrada, Mendoza told them to come outside so they could make arrangements with the two men in the car (261-262).

Mendoza and Estrada left the building together and Estrada started to talk to its occupants. Mendoza left and started walking back to the 7-Eleven store. Before he reached the store, he noticed the car, now with four individuals occupying it, pass him. The car in question was a gold Ford Taurus station wagon with a blue interior strewn with garbage. It had an automatic transmission with the shift lever on the steering wheel (268-269). The passenger in the car had pointed out the shovels in the back of the station wagon. One of the tools was a two-handed implement for digging holes and removing dirt (271, 275-276). Mendoza identified a photograph of the car he had ridden in that morning (377). He distinctly remembered the right rear passenger door because it was dented and difficult to open (259, 277-278, 280).

---

[1] Page numbers refer to the trial transcript.

The Victims

Perez illegally immigrated to the United States in July 2000. He worked some days as a day laborer, part of a group of individuals who wait at street corners in Farmingville for contractors to hire them. On September 17, 2000, he was living at 243 Berkshire Road in Farmingville, with several other Mexicans, including Estrada and Mendoza (493-494, 501).

Estrada illegally immigrated to the United States in January 2000. He moved to Farmingville for the summer. He worked digging holes for light poles (669-671).

The Attack

When Mendoza awoke Perez, he agreed to go to work. Mendoza told him that his prospective employers, two Anglo-Saxons (one being petitioner) were waiting outside in a car (503-504, 674-675). Perez saw petitioner sitting in the front passenger's seat of the car and Estrada behind Ryan Wagner, the driver. With some difficulty, he opened the rear door on the passenger's side and got inside. Following introductions in the car, petitioner asked if they were Mexicans. They replied yes (507, 677). Petitioner asked Estrada if he had a driver's license. Estrada said no and asked if it was difficult to get one. Petitioner showed his driver's license to Estrada (677).

Wagner drove to a 7-Eleven at Exit 64 of the Long Island Expressway. Wagner, Estrada and Perez got out while petitioner stayed in the car. Wagner paid for coffees and they all got back into the car. Perez and Estrada were asked if they liked beer. Wagner said he had been to Cancun (507-508).

When the car arrived at an abandoned building site, petitioner, Perez and Estrada got out and removed two shovels, a post-hole digger, and a tire iron from the back of the car. Wagner parked nearby. Petitioner led Estrada and Perez towards the rear of the building (509-512, 678). As they were walking, Estrada was concerned about how abandoned the building looked. Perez tried to allay his

fears (518, 678, 683). Wagner told them to start cleaning up the basement. They complied using the tools Wagner had removed from the car, including the post-hole digger which was described as a double shovel used to make holes in dirt (518).

Perez and Estrada began working and petitioner left the basement. He and Wagner returned shortly thereafter, approaching the two men from behind. Suddenly petitioner hit Estrada with the post-hole digger in the back of the head. Estrada fell and Perez thought that the hard blow might have killed his friend. Meanwhile, Wagner came at Perez with a folding knife, cutting him on the hand. Perez dropped the shovel and backed away while Wagner advanced with the knife. Simultaneously, Perez could see petitioner beating Estrada. Perez began to run, precipitating a scream from Wagner "He's getting away!" (520-521, 684).

As Perez got outside the building, his muddy boots caused him to slip and fall but only his left hand touched ground (606, 651-654, 658). As he got back up on his feet, petitioner caught up with him and delivered a glancing blow with the post-hole digger to the left side of Perez's head. Perez screamed, "Help me!" Estrada got to his feet and ran towards petitioner. Perez noticed Wagner again advancing towards him with the knife. He picked up a stick to try to defend himself, but he dropped it when Wagner cut him on his shoulder and hand. Estrada managed to hit Wagner in the back, prompting him to run. When Estrada returned, he helped Perez run towards the Expressway (518-523, 603-609, 634-637, 685-686).

Immediate Assistance

Estrada and Perez reached the expressway around 7:00 a.m. Some cars swerved away, but Steven Serrecchia stopped to help. He used a fan belt to stop the blood gushing from Perez' right wrist (64-69). Soon Deputy Sheriff James Rochford came on the scene, and he applied bandages to both arms of Perez (81-90). At 7:11 a.m., Officer Brian Connelly responded to the emergency call. He observed

pools of blood below the wrists of Perez. Officer Connolly contacted a Spanish speaking 911 operator who could translate for the victims (118-225). Officer Jeffrey Klug was dispatched to search the abandoned building for evidence (105-117). Lew Morgenstern was an EMT who recognized the need for advanced life support. Perez went into the first ambulance. Estrada followed in another (188-198). They were both brought to Brookhaven Memorial Hospital.

The Hospital

Lillian Lopez, a certified emergency nurse, and Doctor Shari Becker tried to control Perez' bleeding in the emergency room, but it made inspection of the wounds difficult. Perez had a deep cut on his right wrist, a slash on his left forearm, another slash on his face to his right ear, and two more cuts on his left shoulder (524-527). After applying a tourniquet, the bleeding slowed sufficiently to observe that it was the ulna artery and that there was tendon and muscle damage five centimeters deep to the victim's bone. They determined the wrist wound to be life threatening. Forty minutes after arrival, the bleeding vessel was ligated by Doctor Prichip (1414-1416, 1447-1455).

Doctor Kenneth Kneessy was the plastic surgeon who repaired many of Perez' injuries, including the lacerated tendon, another partially severed tendon, and the cuts in the medial nerve. He also considered the injuries to have been life threatening (1483-1488). Doctor Alan Nemeth, a physician specializing in emergency medicine at Brookhaven Memorial Hospital, treated Estrada (1432-1435). The victim had a two centimeter wound on the back of his head and complained of back, neck and shoulder pain (1435). In the physician's professional opinion, a single blow to the back of the head could have caused death (1437). Perez would later testify about the residual pain of his injuries, lasting more than a year after the assault (528, 543). He endured extended medical attention including rehabilitation (529-530). The weakness in his right hand prevented him from working for three months (544-545).

The Investigation

On September 17, 2000 around 8:00 a.m., several police officers responded to an abandoned building on Napcon Drive in a Shirley industrial complex (432). As Officer Peter Reilly and his partner, Officer McLaughlin, drove near the building, they encountered a green minivan parked on the south side of the road. Because they considered it odd to find a vehicle there at that time of day, they pulled in behind the vehicle. One of the occupants got out and asked if it was okay to walk his dog there. Officer Reilly replied in the affirmative (433-434). The officers then continued to the abandoned building and met with Officer Jeffrey Klug.

As Officer Klug was leaving the industrial complex he also noticed the green minivan parked on the shoulder of the road (470-472). He considered it odd that none of the occupants of the van looked at him as he drove by. He discerned them to be three white males. Officer Klug stopped and noted the plate number to run a registration check at 8:14 a.m. (472-474). When the minivan made a u-turn and passed him, he followed it (474-475). After following the minivan onto the Long Island Expressway going west, Officer Klug turned back at Exit 67 (478-480). Later that same morning, Officer Klug learned the minivan was registered to a Ronkonkoma business called Delta Well and Pump Company (479).

At about 8:00 p.m. that day, Detective Allen VanWickler followed up on the green minivan plate number. At Delta Wells on Union Avenue in Holbrook, he spoke with Donna Bensin, the president of the company. She initially claimed that she knew nothing about the vehicle with the indicated license number, but when a one-letter correction was made, she acknowledged corporate ownership of the green minivan (1064-1065). She promised to find out who had been using it (1066). Around two hours later, Detective VanWickler received a call from Peter Horvath, who stated that he, Wagner (whom Horvath claimed to only know by first name), and petitioner had used the van for a

dog run (1067). Horvath said petitioner suggested the industrial park instead of the beach (1067).

VanWickler also spoke to petitioner on the phone that night. Petitioner gave his address as 66 Old Country Road, Melville, even though it was his girlfriend's parents' home and not his residence. He also denied knowing Wagner's last name. Asked why they chose to run dogs there, petitioner admitted knowing that area as a previous job site where he had worked (1077-1078).

On Sunday, September 23, 2000, VanWickler went to 66 Old Country Road in Melville and met Karl Bensin, the head of Bensin Construction. His daughter, Amy Bensin, was petitioner's girlfriend (1079-1080).

After interviewing Karl Bensin and his wife, Detective VanWickler and his partner drove to 182 Union Avenue and observed a white Lotus parked in the driveway. They also noted a red Honda with a Pennsylvania license plate and a white Ford Taurus station wagon. They recorded all three licenses for registration checks (1081).

Evidence Analysis

Officer John White processed the broken post-hole digger and recovered two hairs from the tool, as well as some blood (815).

On October 3, 2000, Officer White participated in executing a search warrant on petitioner's 1990 Ford Taurus, with instructions to dust the car for fingerprints (822). His examination revealed scrape marks along the exhaust pipe of the vehicle, which was consistent with the victim's statements that the car had scraped its undercarriage before the tools were removed from the car (768, 828).

Ann Juston, a forensic scientist, performed DNA analysis on a number of samples associated with this crime and compared them with four known samples previously obtained from petitioner, Wagner, Perez and Estrada. A swab obtained from the area of the assault matched the DNA sample received from Estrada (1000).

The saliva stain obtained from the lip area of a 7-Eleven coffee cup found floating at the scene also matched Estrada's DNA profile (1002). The swab from the handle of the post-hole digger and from the metal portion of the post-hole digger matched the DNA profile of Perez (1002, 1004). Two stains recovered from the driver's seat of the Taurus matched the DNA profile of Ryan Wagner (1005).

Thomas Saveski, a forensic scientist, examined hair from petitioner, Wagner, and Perez. Petitioner and Wagner both had Caucasian hair with Wagner's hair being dyed a lighter color. Perez had hair of a mixed racial origin. The hair found on the post-hole digger was also of mixed racial origin so it did not come from petitioner or Wagner but could have come from Perez (1120-1138).

Donald Doller, a forensic scientist, examined several items, including five pairs of known footwear. One pair came from each victim, one pair of boots belonged to petitioner, and two pairs were from Ryan Wagner (1148-1160). Doller compared the prints produced by those boots with questioned footprints on various items recovered from the crime scene. One print, the outline of a shoe, was consistent with the size 9 right boot worn by petitioner (1161). During his examination of the 1990 Ford Taurus station wagon, Doller noted that the right rear passenger door was difficult to open and made a noise because of a dent (1167). He also confirmed that the tire iron found at the scene came from a Ford (1168).

Pre-trial Decisions

After a mysterious absence from Suffolk County between September 19, 2000 and November 1, 2000, petitioner surrendered with his attorney to the Suffolk County District Attorney's Office. Co-defendant Ryan Wagner had already surrendered on October 10, 2000. Petitioner's attorney informed the prosecution that his client would not be making any statements. During the arrest process, police officers photographed petitioner and his tattoos. Subsequently, defense counsel moved to suppress the tattoo photographs, arguing, inter alia, that

their taking and use violated petitioner's constitutional rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. The prosecutor argued that arrest photographs were proper but also moved to have a second set of photographs taken pursuant to court order under New York State Criminal Procedure Law §240.40(2)(b)(iv) and (v) as non-testimonial exemplars.

On February 26, 2001, the County Court of Suffolk County (Cacciabaudo, J.) issued a Memorandum Decision denying petitioner's motion for suppression of the photographs and granting the motion for court-ordered exemplars. The court noted that probable cause was not in issue because petitioner had surrendered. The court rejected the argument that a subject in custody has a legitimate expectation of privacy, which would prevent the photographs in question. Photographing tattoos was held to be a minimal intrusion that, under the Fourth Amendment, was neither an unreasonable search and seizure nor a violation of the right to privacy. Relying on *Schmerber v. United States,* 384 U.S. 757 (1966) and *People v. Peters*, 135 A.D.2d 841 (2d Dept. 1987), the court held that photographing physical characteristics was not a taking of testimonial evidence subject to the Fifth Amendment privilege against self-incrimination and that such arrest processing was not a critical stage requiring the presence of counsel under the Sixth Amendment. Finally, the court granted the request for the retaking of photographs of petitioner's tattoos as nontestimonial evidence for proof of his motive to commit the crimes charged.

Following a *Wade* hearing held on May 30 and June 6, 2001, the County Court held, in a decision dated June 8, 2001, that the lineup identification of petitioner by Perez on November 2, 2000 was not suggestive and would be admissible at trial. Photographs of the lineup would also be admissible.

On July 26, 2001, defense counsel submitted a motion in limine to preclude any testimony about or photographs of the tattoos because they were irrelevant and prejudicial. At this hearing, defense counsel made the following objections

to the tattoos, all of which were considered prior to jury selection: (1) that the tattoos had no relevance; (2) that the tattoos were communicative and not for purpose of identification; (3) that expert testimony about tattoos would be unable to connect the meaning of the tattoos to the crime charged; (4) that white supremacy ideology was collateral to the issue of guilt; (5) that Nazi insignia are anti-Semitic but not necessarily anti-Hispanic; (6) that creation of the tattoos was too remote for them to be admissible for acts committed five to seven years later; (7) that the tattoos were more prejudicial than probative; and (8) that these tattoos should be treated like evidence of uncharged crimes which required a pre-trial hearing on admissibility.

The prosecution opposed the motion by oral argument and responded that it is permissible to display relevant tattoos in court and identification was not the sole basis for admissibility, citing *People v. Rodriguez*, 64 N.Y.2d 738 (1984); *People v. DiBella*, 277 A.D.2d 699 (3d Dept. 2000), *lv. denied*, 96 N.Y.2d 758 (2001); *People v. George*, 227 A.D.2d 316 (1st Dept. 1996); *People v. Rios*, 171 A.D.2d 582 (1st Dept. 1991); *People v. Rodriguez*, 167 A.D.2d 326 (1st Dept. 1990); and *People v. Baez*, 131 A.D.2d 687 (2d Dept. 1987). The point was also made that Nazis hated all non-Aryans, not just Jews. The court was asked to adhere to its prior ruling on the tattoos. The prosecutor declined to seek a pre-trial ruling for petitioner's tattoos as admissible prior bad acts. The court denied the motion in limine in a written decision on September 10, 2001.

Trial

In her opening statement, the prosecutor outlined the evidence to be presented and explained that the tattoos would not be introduced to identify petitioner but to explain his state of mind and motive for the crime.

After describing the deception and the attack, Perez described the car in which he rode to the crime scene as a gray four door Ford Taurus, with blue interior and a rear passenger side door that was difficult to open. He identified a photograph of petitioner's car as the same car he

rode in that day (540). Perez also testified that he picked petitioner out of a lineup composed of six similarly attired individuals all wearing glasses on November 2, 2000. He had also identified Ryan Wagner in a lineup on October 11, 2000. He testified that these were the two men who attacked him and Estrada.

When Estrada testified, he described the crime but made no in-court identification. He had been unable to identify either petitioner or Wagner at lineups held on March 2, 2001, six months after the crime, which was when he was brought back from Mexico.

In addition to the testimony of the victims, the law enforcement personnel, and the civilian witnesses, which has already been described, several acquaintances of petitioner also testified.

In September 2000, Peter Horvath had been friends with petitioner for seven years. They lived with their respective girlfriends, Anna Barna and Amy Bensin, at 182 Union Avenue in Holbrook. On September 16, 2000 the four of them had gone on a fishing trip organized by Bensin Contracting, after which they had returned to 182 Union Avenue in Bensin's mother's green minivan (300-301). At about 6:00 p.m., while Horvath and petitioner were alone in the house, they heard loud Spanish music coming from a band at the house across the street. Petitioner called the police who came to the house across the street in twenty minutes and then the music stopped (293, 296, 299-306, 315-317).

While it was still dark on the morning of Sunday, September 17, 2000, Horvath saw Ryan Wagner twice. The first time was when the sensor light on the first-floor deck outside his room turned on. He walked outside and saw Wagner. Horvath asked him what he was doing standing next to the deck. Horvath suggested that Wagner should go home and go back to bed (317, 320-325).

Horvath next saw Wagner at 7:45 that morning. Petitioner came to Horvath's room and asked if he wanted to join them for a dog walk. Horvath agreed and drove the green minivan belonging to Donna Bensin. Wagner was in

the front passenger seat, and petitioner sat in the back. Horvath followed petitioner's directions to Exit 68 on the Long Island Expressway, ultimately turning into an industrial park. While they were stopped but still inside the van, a police car pulled in behind them. Petitioner asked about walking the dog (320-329, 332-334).

Shortly after 10:00 p.m., Horvath was awakened in his room by petitioner and Bensin. The police were asking about the van and Horvath had been the driver. Reluctantly, he called Detective VanWickler and told him that he and two others had been in that area. Because he did not have a valid driver's license, Horvath told the police that petitioner drove the van (340-346).

Horvath had no idea where petitioner went between the day after the attack and the day before petitioner surrendered about six weeks later. During Horvath's acquaintance with Wagner, Wagner drove two cars, one of which was petitioner's Ford station wagon. That car remained parked at 182 Union Avenue while petitioner was gone. Two weeks after the attack, Horvath and Barna moved out of 182 Union Avenue and into her parent's home. When Horvath finally saw petitioner on November 1, 2000, petitioner had grown a full beard (347, 361, 407-410).

During his years of friendship with petitioner, Horvath learned that they shared personal beliefs on many issues (411), including their heritage. He knew petitioner studied the Bible. Horvath testified that Christian Identity was based on a biblical interpretation that Abraham and the other patriarchs of the Bible were of European descent. As a Christian Identity follower, Horvath believed people of European descent should stick together and he believed petitioner felt the same way. During discussions about "[their] people," i.e., white people, he and petitioner had discussed the ten northern tribes of Israel. Petitioner had also expressed his belief that Europeans should stick together and keep apart from non-European races (411-416).

Horvath identified People's Exhibits 19 through 34 as photographs of tattoos that were on petitioner's body in

September 2000, the most recent being about five years old (374, 384-386, 393-397).

Anna Barna was Horvath's girlfriend. She corroborated Horvath's testimony about the living arrangements at 182 Union Avenue and about petitioner calling the police to complain about the loud music (1023, 1027-1031).

On the morning of September 17, 2000, Barna heard someone leave the house at 6:30 a.m. Around 8:00 a.m., petitioner came into the downstairs bedroom and asked Horvath if he wanted to take the dogs for a walk. Barna heard petitioner say "I know a good place for a run." Barna saw Horvath, his dog, petitioner and Wagner before they left. She had met Wagner about eight times and knew him as petitioner's friend. She saw a new cut on Wagner's knuckles and asked him if he was okay. Wagner told her "Don't worry about it". Petitioner told her they would not be back right away. They left in the green minivan but returned about ninety minutes later. Wagner stayed for about another hour and then he left by himself (1036-1041).

Barna testified she was familiar with petitioner's religious beliefs because they had spoken about petitioner's literal understanding of the Bible. She also remembered him complaining that the Government does nothing about undocumented day laborers. This comment was made after he read a news article several months before September 2000 (1047-1048, 1053).

Amy Bensin had been petitioner's girlfriend for about five years. They had lived together for four years, two years at 182 Union Avenue. On September 17, 2000, Bensin saw petitioner and Wagner in the kitchen at 182 Union Avenue at about 7:00 a.m. Before petitioner left, he asked if anyone wanted breakfast. They were gone much longer than necessary for getting breakfast. Bensin was mad they had taken her mother's van for so long. She asked them where they had been but did not get an answer (1225-1236).

When her mother called that evening, Bensin put petitioner on the phone. She remembered he told her

mother they used the van to take the dog for a walk (1210-1211, 1225-1240).

The next morning, Bensin left for work without seeing petitioner. She came home around 4:00 p.m. and watched television with petitioner. They saw a story about two Mexicans getting hurt. He mentioned he was going to visit his sick grandfather but that was the first time she had heard there was some illness. Petitioner did not say goodbye and she never saw him again until the trial. His car remained parked at 182 Union Avenue from September 18 to November 2. Petitioner did call her two or three times but only reached her answering machine. She never learned where he went (1222, 1242-1243, 1250-1255, 1260-1265).

Bensin said she knew nothing about petitioner's religious beliefs but she knew he believed the races should stay separate. She had also heard him use racial epithets (1274-1281).

Cornelius Collins was petitioner's immediate supervisor at Bensin Contracting, had sponsored petitioner's application to the Plumbers' Union at the request of Amy Bensin's father. One of the Bensin Company job sites was located in the same Shirley industrial site as the scene of the crime. Petitioner had worked at that Shirley site for two to three weeks prior to September 17, 2000. Collins last saw petitioner at work on Monday, September 18, 2000. The next day petitioner did not show for work. Collins never heard any explanation about why he stopped working (1282-1289).

Karen Evans, a Verizon investigator, authenticated telephone company records relating to certain New York City pay phones located in the same general vicinity ranging from 50th to 53rd Streets and between Sixth and Seventh Avenues in Manhattan. Evans also authenticated telephone records for a Hess gas station at 301 Union Avenue in Holbrook. She identified the phone number 631-467-7823 as being assigned to Donna Bensin at 182 Union Avenue in Holbrook. She identified the phone number 718-894-3869 as belonging to Dennis Wagner at 59-57 60th Lane in Maspeth, Queens. 718-894-6993 was assigned to Arpol Karlson

in Maspeth. A 917 number could only be identified as going to a cell phone or pager. Nineteen phone calls were correlated by Detective Investigator Thomas McDermott and summarized to likely be frequent calls between petitioner on Long Island and Wagner in New York City.

James O'Mara, a supervisor employed by AFD Contracting Furniture, authenticated his company's records, which showed that Ryan Wagner was making a delivery at 51st Street near Seventh Avenue in Manhattan on September 18, 2000, the day repeated telephone calls had originated from that area to 182 Union Avenue (1631-1635).

Mid-trial Hearing

In camera, an extensive discussion ensued regarding the proposed expert testimony of a New Jersey investigator with knowledge about skinheads and white supremacists. Defense counsel argued that these were not scientific topics and that no one should be qualified as an expert about them, especially a police officer. He also urged that the tattoos should not be considered evidence at all but, once they were admitted, the proposed expert testimony was improper bolstering. He pointed out that there was no connection between petitioner and any gang activity. Co-counsel for petitioner noted that since tattoos were art with multiple interpretations, the expert testimony was not helpful because swastikas and SS lightning bolts were not beyond the ken of a typical juror. He also posited that the First Amendment should protect petitioner's private thoughts about his tattoos (1397-1400, 1539-1548).

The prosecution countered that expert testimony was needed to explain that a white fist meant white power, that the initials NYHC had to be interpreted for the jury since New York Hate Corps was not common knowledge for a typical juror, and that the tattoos, by themselves, were not testimony so expert testimony was needed to explain them. Despite being over five years old, the tattoos were still relevant to petitioner's state of mind. The prosecutor agreed that there would be no proof that petitioner had any gang connection (1549-1554).

The court ruled that the expert could not testify what petitioner may have been thinking but only what the tattoos appeared to mean. The court held that the tattoos relevance to the Aggravated Harassment counts outweighed any unfair prejudice. The court agreed to give a limiting instruction for the expert testimony so the process would be fair overall (1554-1555, 1557-1559).

Prior to testifying before the jury, Sergeant Louis Jordan was questioned in a mid-trial hearing to establish the scope of his expertise. After delineating his credentials, Jordan claimed expertise in white supremacy, motorcycle gangs, satanic cults, street gangs and prison gangs (1575-1593).

Defense counsel renewed his Fifth Amendment argument and the Court again rejected it, relying on *People v. Siu Wah Tse*, 91 A.D.2d 350 (1st Dept.), *lv. denied*, 59 N.Y.2d 679 (1983). The Court ruled that expert testimony could be based on personal experience without scientific study as long as it is helpful to the jury. Thus, the expert could testify about the meaning of certain tattoos. The Court prohibited the expert from testifying that petitioner's tattoos made him a member of any particular group or that the tattoos meant petitioner shared the beliefs of any particular group (1624-1628).

The Expert

Louis Jordan testified before the jury about his expertise. His testimony has been set forth on pages 38a-64a of the petition for certiorari. The court qualified Jordan as an expert in white supremacy groups and gangs, including tattoos (1644-1664).

Jordan was shown ten photographs of petitioner's tattoos (People's 21, 22, 23, 25, 26, 27, 28, 29, 30, and 32). He described what the various tattoos depicted and how various parts of each tattoo could be recognized as meaningful to a white supremacist (1665-1675).

People's 22 used red and black (the colors of Nazi Germany) and the Nazi swastika with a white fist, which

meant white power. There was also a Celtic cross, which indicated northern European ancestry (1665-1666).

People's 21 depicted a kneeling person with a large nose, a beanie cap, and a coat with money sticking out. This represented a Jewish person. Approaching him, a skinhead was aiming to kick him. The skinhead was identifiable from the Doc Martin boots, rolled up pants, and red suspenders. He held an axe, a bottle of alcohol, and bore a sinister, clown-like visage (1666-1667).

People's 32 also used red and black letters for Nazi reference. The letter "FTW" stood for "Fuck the World," a common phrase among gangs and white supremacist groups. "NYHC" referred to the New York Hard Core also known as the New York Hate Corps. They were a punk rock band that played music featured by skinheads (1668-1669).

People's 23 was the tattoo on the back of petitioner's neck. The letters "ACAB" stood for "All Cops Are Bastards" which is a well known lyric sung by a punk rock band known as the Four Skins. The name of the song is "The Good, the Bad, and the Four Skins" (1669-1670).

People's 28 showed an arrow coming up out of a cloud or body of water. This was an ancient Norse rune known as a "Teawas." It stood for justice and was commonly used by Vikings on their weapons and armor. Below the rune was a Viking ship and the Celtic sign for infinity (1670-1671).

People's 30 also depicted a Viking ship with many shields along the side. This meant pure white chosen people (1671-1672).

People's 29 had a Viking blowing a horn. The warrior stood for white power. There was also the Celtic sign for infinity (1672).

People's 27 had an American flag above the Nazi swastika below a cloud. This was a symbol of hatred. There was another Celtic cross. There was also a skinhead holding up a club and restraining a pit bull on a leash wearing a spiked collar (1673).

People's 25 also combined the American flag, the Nazi swastika, and a bald eagle. This symbolized strength. Two

lightning bolts together was the rune for the Nazi elite military group known as the SS. This storm trooper insignia is used by skinhead security forces. The tattoo also depicted a skinhead wearing braces (suspenders) on a bare chest and holding a flaming club as he stepped upon human skeletal remains (1673-1674).

People's 26 was similar to People's 25. There was a Nazi swastika in a cloud, an American bald eagle, the SS lightning bolts, and a skinhead holding a club. A tank was crushing human skulls as it emerged from a city on fire (1675). The People rested after Jordan's testimony.

Sentence

On October 4, 2001, petitioner appeared for sentencing in the County Court (Cacciabaudo, J.). Defense counsel asked for leniency and pointed out that petitioner broke off the attack and ran away (see sentence minutes, p. 9).[2] The court noted that a juror, after discharge, had been reported in the media saying the tattoos were not considered during deliberations. (See sentence minutes, p. 26). Petitioner was sentenced to three concurrent and indeterminate terms of incarceration from twenty-five years to life in prison, plus concurrent terms of seven years, one year, and one year on the other three counts. Petitioner thus avoided consecutive sentencing for two victims.

Direct Appeal

On direct appeal, petitioner raised numerous issues including his claim that the tattoos were not relevant and too prejudicial. On November 25, 2002, the Supreme Court of New York, Appellate Division, Second Department, affirmed the judgment of conviction without any mention of the tattoo evidence. *People v. Slavin,* 299 A.D.2d 499 (2d Dept. 2002).

---

[2] The sentencing minutes were not transcribed until after the conviction was affirmed by the New York State Appellate Division but were later provided to petitioner and the New York State Court of Appeals prior to argument in that higher court.

On June 11, 2003, Chief Judge Judith Kaye granted leave to appeal to the New York State Court of Appeals. *People v. Slavin*, 100 N.Y.2d 566 (2003). On appeal from the Appellate Division, petitioner again raised numerous objections to the tattoo evidence in his brief and at oral argument, which was heard on January 8, 2004. On February 17, 2004, the judgment below was affirmed. *People v. Slavin*, 1 N.Y.3d 392 (2004). Four judges agreed there was no compelled self-incrimination. Two judges dissented, in part, in an opinion that held there was error, but that it was harmless beyond a reasonable doubt. The only reason this was a dissent instead of an opinion concurring in result was because they would have reversed the Aggravated Harassment misdemeanors.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The decision of the New York State Court of Appeals is in harmony with federal constitutional interpretation of the Fifth Amendment privilege against self-incrimination and the holding in *United States v. Hubbell*, 530 U.S. 27 (2000).

Use of tattoo photographs with expert testimony to prove the motive for a hate crime is entirely proper. Throughout the criminal prosecution of petitioner, the argument was advanced that tattoos that communicate thought processes are testimonial and thus their use cannot be compelled consistent with the Fifth Amendment privilege against self-incrimination. However, use of statements voluntarily made in the past is not compulsion of testimony and the New York Court of Appeals so recognized. Using physical characteristics of a defendant's body as evidence is clearly permissible under case law interpreting the Fifth Amendment. Furthermore, to compare tattoos to other previously created written statements such as documents is not a dubious analogy. *United States v. Hubbell*, 530 U.S. 27 (2000) is directly on point and was correctly relied upon by the majority in the decision below.

The United States Constitution provides that, "no person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This privilege arose in England in response to coerced confessions in ecclesiastical courts. Heretics who confessed were killed quickly and those who remained obdurate were burned alive. The legal concept does not forbid the use of incriminating testimony but rather government compulsion to create such testimony. Thus, the word "witness" limits the category of compelled incriminating communications to those that are testimonial in character. *United States v. Hubbell*, 530 U.S. 27 (2000); (production of subpoenaed documents can be testimonial); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (fact speech of drunk driver was slurred was incriminating but non-testimonial); *Doe v. United States*, 487 U.S. 201 (1988) (consent form for disclosure of unidentified bank documents would not acknowledge existence, possession, or authenticity so non-testimonial); *Schmerber v. California*, 384 U.S. 757 (1966) (privilege from production of evidence of testimonial or communicative nature does not apply to drawing of blood); *Holt v. United States*, 218 U.S. 245 (1910) (compelling defendant to wear specific blouse did not contravene privilege against extorted communications because there is no exclusion of the defendant's body as material evidence). Nor does the privilege bar the seizure of testimonial evidence. The government is only precluded from compelled creation of incriminating testimony. *Katz v. United States,* 389 U.S. 347 (1967); *Hoffa v. United States*, 385 U.S. 293 (1966).

Petitioner has focused on the "communicative" aspect of his tattoos and urged that they are, therefore, testimonial under *Schmerber, id.* The New York State Court of Appeals has defined "testimonial or communicative evidence" to be that which reveals a person's subjective knowledge or thought processes. *People v. Berg*, 92 N.Y.2d 701 (1999); *People v. Hager*, 69 N.Y.2d 141 (1987). However, it should be recognized that prior voluntary communicative acts are distinguishable from those communicative acts which retain the testimonial aspect required under Fifth Amendment analysis. *People v. Holmes*, 304 A.D.2d 1043

(3d Dept. 2003) (tattoo with nickname "Polo" was communicative but its display to jury was non-testimonial); *People v. Spruill,* 299 A.D.2d 374 (2d Dept. 2002) (alteration of tattoo from "Pike" to panther evinced consciousness of guilt); *People v. Mars,* 266 A.D.2d 316 (2d Dept. 1999) (love letters from defendant to non-spouse which were found by defendant's estranged husband were admissible as motive). Prior communications without any testimonial aspect are outside the constitutional privilege. *Crawford v. Washington,* ___ U.S. ___, 124 S.Ct. 1354 (2004).

Aside from communicativeness, the act of producing evidence can run afoul of the privilege under certain circumstances. *Andersen v. Maryland,* 427 U.S. 463 (1976) (no violation where voluntarily created documents were seized from defendant and authenticated by third person); *Fisher v. United States,* 425 U.S. 392 (1976) (defendant's tax documents were seized from accountant so no violation of privilege which is personal); *Johnson v. United States,* 228 U.S. 457 (1913) (party is privileged from producing the evidence but not from its production); *In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992,* 1 F.3d 87 (3d Cir. 1993) (act of production can violate privilege if existence and location of evidence unknown to government or where production will constitute authentication); *In re Grand Jury Proceedings (Johansen),* 632 F.2d 1033 (3d Cir. 1980) (private appointments date books protected from production); *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990,* 741 F.Supp. 1059 (S.D.N.Y. 1990) (privilege protects personal non-business documents); *In re Vanderbilt (Rosner-Hickey),* 57 N.Y.2d 66 (1982) (act of producing tape recording required vouching for circumstances of preparation and accuracy which is implied authentication and privileged); *People v. Copicotto,* 50 N.Y.2d 222 (1980) (defendant could be source of sales receipts because existence and fact of possession known to prosecution; only more private papers are privileged to protect inner sanctum of individual feeling and thought); *People v. Beckwith,* 303 A.D.2d 594 (2d Dept. 2003) (marijuana in pocket of arrestee who admitted possession prior to *Miranda* was still admissible real evidence); *People v. Sirmons,* 242 A.D.2d 883 (4th Dept. 1997), *lv. denied,* 92 N.Y.2d

1038 (1998) (alibi evidence discoverable since defendant already intends to use at trial); *Prudential Securities v. Brigianos*, 233 A.D.2d 18 (1st Dept. 1997) (subpoena for securities documents quashed); *Application to Quash a Grand Jury Subpoena Dated December 28, 1992*, 157 Misc.2d 432 (Sup. Ct. N.Y. Co. 1993) (no privilege implication for discovery that contributes no new knowledge to government beyond statement itself). The testimonial nature of the production is what places these examples within or without the privilege.

Under the "foregone conclusion" theory, an act of production does not violate the privilege where the government already knows the evidence exists and the nature of its possession. *United States v. Hubbell, id.*; *Doe v. United States, id.*; *Andresen v. Maryland, id.* Petitioner's tattoos fit neatly into this exception for acts of production since their discovery was inevitable under normal police procedures. *People v. Turiago*, 90 N.Y.2d 77 (1997); *People v. Stith*, 69 N.Y.2d 313 (1987); *People v. Fitzpatrick*, 32 N.Y.2d 499 (1973). And once the tattoos were revealed, their use as evidence did not depend on testimony from petitioner. *In re Grand Jury Duces Tecum Dated December 14, 1984, Y., M.D., P.C. v. Kuriansky*, 69 N.Y.2d 232, *cert. denied*, 482 U.S. 928 (1987); *In re Vanderbilt (Rosner-Hickey), id.*

This Court originally indicated that the privilege against compelled self-incrimination prohibited any use of evidence contained in private papers to prove a person's guilt. *Boyd v. United States*, 116 U.S. 616 (1886). But the apparent conceptual basis for this view, a Fifth Amendment concern for privacy, is no longer viable. *Fisher v. United States, id.*; *Doe v. United States, id.*; *Barrett v. Acevedo*, 143 F.3d 449 (8th Cir. 1998). Modern interpretation of the privilege does not protect any privacy interest in the contents of a private written statement voluntarily created. Furthermore, even if a personal document like a diary were protected under a minority interpretation of the privilege, such a theory should not extend to an easily observed tattoo. If defendant surrendered to police with a letter in his pocket about how he hated Mexicans, that would be admissible as evidence. Tattoos on non-intimate

areas of the body can be seen and described without a defendant's involvement. Thus, tattoo photographs taken after arrest or by court order can be discussed by an expert without any defendant involvement at trial.

We must reiterate our position that the communicative aspect of some tattoos does not lessen the essence of all tattoos: physical characteristics whose observation requires no testimonial act. *Pennsylvania v. Muniz, id.*; *United States v. Dionisio,* 410 U.S. 1 (1973); *Gilbert v. California,* 388 U.S. 263 (1967); *United States v. Wade,* 388 U.S. 218 (1967); *Schmerber v. California, id*; *United States v. Esdaille*, 769 F.2d 104 (2d Cir. 1985) (all physical characteristics are non-testimonial and display may be compelled with admissibility depending on reliability); *Oliver v. Middlebrooks*, 402 F.2d 781 (5th Cir. 1968) (needle tracks on arm were available as evidence because body itself is outside protection of Fifth Amendment); *In re Layden,* 446 F.Supp. 53 (N.D. Ill. 1978) (attempt to get defendant to feign handwriting exemplars was more than physical characteristic and violated privilege); *People v. Scarola,* 71 N.Y.2d 769 (1988) (tattoos are non-testimonial); *People v. Suarez*, 298 A.D.2d 218 (1st Dept.), *lv. denied,* 99 N.Y.2d 565 (2002) (photographs of non-injury and tattoo showed physical characteristics which could be seen by jury at trial anyway); *People v. Peters*, *id.* (photograph of Rasta hair was non-testimonial); *People v. Boudreau*, 115 A.D.2d 652 (2d Dept. 1985) (physical coordination tests for sobriety outside protection of privilege); *People v. Smith*, 86 A.D.2d 251 (3d Dept. 1982) (voice exemplar was physical characteristic and thus privilege inapplicable); *People v. Rosario*, 136 Misc.2d 445 (Crim. Ct. Bronx Co. 1987) (unlike physical act such as nod or shake of head, breathing into breathalyzer is non-testimonial).

Petitioner also maintains that court ordered discovery of his tattoos under New York State Criminal Procedure Law §240.40(2)(b) was unavailable because the tattoos were testimonial. However, this begs the question. Since the tattoos were non-testimonial, the statute permitted their discovery. The language "may order the defendant to provide non-testimonial evidence" does not create any

separate statutory restriction upon non-testimonial evidence beyond the limits imposed by the state and federal constitutions. *People v. Colavito,* 87 N.Y.2d 423 (1996); *People v. Copicotto, id.*; *People v. Alpern*, 217 A.D.2d 853 (2d Dept. 1985). Non-testimonial evidence, even of a prior communicative nature, is not exempted from New York State statutory discovery.

Although the tattoos were incriminating evidence for motive for petitioner's hate crime, he never gave any testimony about them whatsoever. Physical characteristics, which also happen to be prior voluntary communicative statements, reflect prior thoughts and actions without any extortion of contemporaneous thoughts. *Couch v. United States*, 409 U.S. 322 (1973) (privilege does not extend to records possessed by defendant's accountant); *Curcio v. United States*, 354 U.S. 118 (1997) (corporate officer must produce records but retains privilege as to oral testimony); *People v. Berg, id.*; *People v. Hager, id.* Petitioner related no factual assertion nor did he disclose any non-preexisting information. *Pennsylvania v. Muniz, id.*; *Doe v. United States, id.* The Fifth Amendment privilege remained untransgressed.

II. The decision of the New York State Court of Appeals is also in harmony with federal constitutional interpretation of the First, Fourth, Sixth, and Fourteenth Amendments.

Petitioner's other constitutional arguments also lack merit. The right to free speech guarantees the right to express disagreeable and offensive ideas like racial inferiority. U.S. CONST. amend. I. But there is no First Amendment right to exclude nonverbal statements, like membership in an organization or a body tattoo, from being evidence in a criminal case. *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377 (1992); *Dawson v. Delaware*, 503 U.S. 159 (1992); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Indeed, courts are not in agreement that all possibly expressive conduct deserves First Amendment protection. *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is protected); *Bery v. City of New York*,

97 F.3d 689 (2d Cir. 1996) (public art display is protected); *Yarkew v. Sinclair*, 495 F.Supp. 1248 (D. Minn. 1980) (tattoo is not protected communication); *State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002) (tattoo is not protected speech); *State v. Medical Lic. Bd. v. Brady*, 492 N.E.2d 34 (Ct. App. Ind. First Dist. 1986) (artistic tattooing not protected).

Once the tattoo has been created and any possible statement intended thereby has been expressed, however, subsequent desire to keep a tattoo concealed has nothing to do with the First Amendment. Depending on the location of the tattoo, the source of such a constitutional claim would have to be the right to privacy. The First Amendment is no barrier to the admission of evidence on one's beliefs or associations. *Dawson v. Delaware, id.*; *Barclay v. Florida*, 463 U.S. 939 (1983). Speech protected by the First Amendment can be used to establish the elements of a crime or to prove motive or intent. *Wisconsin v. Mitchell, id.* Once a tattoo is created, like any other prior statement, it can become evidence in a criminal case.

There was also no violation of the constitutional right to be free from unreasonable search and seizure. U.S. CONST. amend. IV. The touchstone for analysis of this claim is whether society will recognize a legitimate expectation of privacy in the place or object searched. *Katz v. United States, id.* This test has two components: (1) whether a person has manifested some subjective expectation of privacy and (2) whether society should honor that expectation as reasonable. Prior to a lawful arrest, a search or seizure can be considered reasonable if done pursuant to a judicial warrant or if police conduct otherwise falls within some exception to the warrant requirement. Once petitioner surrendered, he conceded police had probable cause to believe he committed a crime. Contemporaneous to this lawful custody, petitioner had a reduced expectation of privacy both subjectively and objectively.

During the arrest process, when petitioner's tattoos were initially photographed, he may have expressed some lack of consent but whether there truly existed a subjective expectation for him to keep his shirt on is debatable. What should not be entertained, however, is petitioner's argument that

photographing outward physical characteristics of appellant's body was an objectively unreasonable search for or seizure of evidence. The creation of arrest photographs is required by New York State statute without being limited to so-called mug shots. See New York State Criminal Procedure Law §§160.01(3) (refers to "the photograph") and 160.50(1)(a) (refers to "every photograph"); *People v. Patterson*, 78 N.Y.2d 711 (1991) (return of arrest photos is not constitutionally required); *People v. Torres*, 291 A.D.2d 273 (1st Dept.), *lv. denied*, 98 N.Y.2d 681 (2002) (photo used to establish appearance, not identification); *People v. Walls*, 277 A.D.2d 959 (4th Dept. 2000), *lv. denied*, 96 N.Y.2d 808 (2001) (tattoo photos admitted); *People v. DiBella, id.* (despite tattoo, photo admitted to establish post-fight physical condition); *People v. Williams*, 170 A.D.2d 552 (2d Dept.), *lv. denied*, 77 N.Y.2d 1002 (1991); *People v. Peters, id.* (post-sale photo admissible); *People v. Gallina*, 110 A.D.2d 847 (2d Dept. 1985) (photo properly used for investigative purpose); *People v. Bagley*, 183 Misc.2d 523 (Sup. Ct. N.Y. Co. 1999); *People v. Lord*, 104 Misc.2d 150 (Crim. Ct. Kings Co. 1980) (statute not designed to thwart creative investigation); *People v. Howard*, 90 Misc.2d 662 (Sup. Ct. N.Y. Co. 1977) (photos may be used to further investigation); *People v. Johnson*, 88 Misc.2d 749 (Co. Ct. Onondaga Co. 1976) (arrest photos should be done at time of arrest); *People v. Killian*, 74 Misc.2d 120 (Co. Ct. Nassau Co. 1973) (lawful duty to photograph). Neither appellant nor counsel can limit the investigative use of an arrest photograph to identification purposes only.

Once a defendant is in lawful custody, he may be forced to exhibit his appearance for more than just a photograph. *Cupp v. Murphy*, 412 U.S. 291 (1973) (fingernail scraping during voluntary questioning); *United States v. Dionisio, id.* (voice exemplars); *United States v. Wade, id.* (lineup with voice exemplars); *People v. Whitaker*, 64 N.Y.2d 347, *cert. denied*, 474 U.S. 830 (1985) (filler for unrelated lineup); *People v. Randt*, 142 A.D.2d 611 (2d Dept. 1988) (pubic combing); *People v. London*, 124 A.D.2d 254 (3d Dept.), *lv. denied*, 68 N.Y.2d 1001 (1986) (lineup on probable cause without filed charges); *People v. Smith, id.* (voice exemplar); *People v. Rumph*, 128 Misc.2d 438 (Sup.

Ct. Kings Co. 1985) (discolored knee display); *People v. Mineo*, 85 Misc.2d 919 (Sup. Ct. Queens Co. 1976) (palm prints); *People v. Allah*, 84 Misc.2d 500 (Sup. Ct. Bronx Co. 1975) (dental impressions); *People v. Sallow*, 100 Misc. 447 (Ct. Gen. Sess. N.Y. Co. 1917) (fingerprints).

Of course, surrendering into custody is not an abandonment of all Fourth Amendment rights. The limits of acceptable police conduct are clear. There can be no physical intrusion beneath the skin without judicial approval and no invasion of personal dignity. *Winston v. Lee*, 470 U.S. 759 (1985) (surgical removal of bullet); *Schmerber v. California, id.* (blood withdrawn); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumped); *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000) (no more "perp walks"); *People v. Ramirez-Portoreal*, 88 N.Y.2d 99 (1996) (surrender of control does not equal waiver of all privacy); *People v. Natal*, 75 N.Y.2d 379 (1990) (property given up at jail can go to DA without warrant); *People v. Cwikla*, 46 N.Y.2d 434 (1979) (wig worn during lineup did not infringe upon right to determine appearance); *People v. Evans*, 43 N.Y.2d 160 (1977) (arrest must precede full body search).

The intrusion into personal privacy that is a full custodial arrest had already taken place. Additional lesser intrusions were not objectionable. *People v. Whitaker, id.*; *People v. Perel*, 34 N.Y.2d 462 (1974); *People v. Chiagles*, 237 N.Y. 193 (1923). The permissible scope of intrusion depends on the crime charged, individual characteristics of the person in custody, and point in the investigation that detention occurred. Even if evidence is later held inadmissible due to privilege, that does not render the initial seizure unlawful. *People v. Perel, id.*

Besides being independently reasonable, there is also the exception to the warrant requirement known as search incident to arrest. While the tattoos did not pose any safety threat, there remained a possibility of destruction, concealment, or alteration. *United States v. Robinson*, 414 U.S. 218 (1973); *People v. Tejada*, 93 N.Y.2d 963 (1999) (post-arrest wallet search); *People v. Grokey*, 60 N.Y.2d 309

(1983); *People v. Smith*, 59 N.Y.2d 454 (1983); *People v. DeSantis*, 46 N.Y.2d 838 (1978), *cert. denied*, 443 U.S. 912 (1979); *People v. Belton*, 55 N.Y.2d 49 (1982); *People v. Spruill, id.*; *People v. Archibald*, 269 A.D.2d 682 (2d Dept.), *lv. denied*, 92 N.Y.2d 880 (2000); *People v. Randt, id., People v. Levan*, 91 A.D.2d 384 (1st Dept. 1983). Thus, photography enabled the police to preserve the tattoos as they existed only six weeks after the crime. Indeed, at least one defendant has argued that a photograph of a tattoo is less prejudicial than a live display. *People v. Herr*, 203 A.D.2d 927 (4th Dept. 1994), *aff'd*, 86 N.Y.2d 638 (1995). Surely the decision to keep that choice available was reasonable. The completeness of the search incident to arrest needs no additional justification. *People v. Weintraub*, 35 N.Y.2d 351 (1974); *Horton v. California*, 496 U.S. 128 (1990); *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California*, 395 U.S. 752 (1969); *People v. Marsh*, 20 N.Y.2d 98 (1967); *People v. Taylor*, 294 A.D.2d 825 (4th Dept. 2002); *People v. Barclay*, 201 A.D.2d 952 (4th Dept. 1994).

The presumption that petitioner knew how the photographs of his tattoos would be used is not a factor in analyzing whether the procedure was reasonable. In fact, their actual ultimate use is also not a factor in assessing the reasonableness of the process used to take them. Although defense counsel puts large stock in his written directives that his client would make no statements, the photographic procedure was not his to control. There are no partial surrenders. Physical dominion over petitioner could not be limited by defense counsel. Basic human dignity does not prevent the removal of a shirt. Once the neck tattoo was observed in plain view, the police were entitled to look for other tattoos. The ability to photograph the tattoos was coextensive with the ability to testify about them. Observing and recording tattoos through photography is hardly a remarkable procedure, much less a reprehensible one. Petitioner's objection to the creation of the tattoo photographs cannot withstand any scrutiny.

Once the tattoo photographs were taken, their subsequent use had absolutely no Fourth Amendment implications. *People v. King*, 232 A.D.2d 111 (2d Dept. 1997) (DNA

sample reused for different rape). Defense counsel made repeated attempts to suppress or exclude the tattoo photographs, which permitted comprehensive judicial review. This opportunity to challenge the photographs fully protected petitioner's rights, even the supposed right to limit the procedure to mug shots. Even involuntary statements remain discoverable prior to determining admissibility. *People v. Huntley*, 15 N.Y.2d 72 (1965). There was no legitimate expectation of privacy to prevent post-arrest photography of appellant's tattoos and the subsequent court order to that effect removed any taint that the arrest procedure could have had on the evidence used at trial.

Nor was there any denial of the right to counsel when the arrest photographs were taken over defense counsel's objection. U.S. CONST. amend. IV. While arrest is a critical stage if counsel is already in place, routine arrest processing is not. Defense counsel did tell police his client would be making no statements, but this directive was honored. Taking pictures of tattoos is not taking a statement. The non-verbal act of being posed for a photograph is only a statement when it is accompanied by an existing thought intended to be expressed to and understood by another. When the intent to make a statement is specifically disavowed, there is no statement. Preservation of statements previously created cannot and should not be stopped by defense counsel.

Petitioner argues that his right to due process and a fair trial was violated by the use of his prejudicial tattoos. U.S. CONST. amend. V and amend. XIV. We would merely reiterate that the relevance of these prejudicial tattoos to motive was argued ad nauseum at every level of petitioner's prosecution. Indeed, our brief in the New York State Court of Appeals surveyed numerous jurisdictions to explain how they treat evidence of tattoos as motive.[3]

---

[3] See *People v. Skinner*, 53 P.2d 720 (Colo. Ct. App., Div. V 2002); *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000); *State v. Novak*, 949 S.W.2d 168 (Mo. App. 1997); *Commonwealth v. Romero*, 1997 WL

(Continued on following page)

Finally, we must point out that there was no reasonable possibility of acquittal even if there was a violation of the Fifth Amendment. *Arizona v. Fulminante*, 499 U.S. 279 (1991). In the dissent below, both Judge Kaye and Judge Ciparick held that admission of the tattoo evidence was error under their interpretation of the privilege against self-incrimination. However, they both agreed that the error was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt. This factor alone should obviate the alleged need for review in the United States Supreme Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN A. HOVANI
Counsel for Respondent
Suffolk County District
Attorney's Office
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
631-852-2463

MICHAEL BLAKEY
Assistant District Attorney
On the Brief

1070445, 43 Va. Cir. 530 (Cir. Ct. Va. Fairfax Co. 1997); *State v. Phelps*, 197 W.Va. 713, 478 S.E.2d 563 (Sup. Ct. App. W. Va. 1996); *People v. Aishman*, 19 Cal. Rptr.2d 444 (Col. App. 4 Dist. 1993); *State v. Macias*, 481 So.2d 979 (Dist. Ct. App., 4 Dist. 1986), *aff'd*, 515 So.2d 206 (Sup. Ct. Fla. 1987); *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501 (N.C. Ct. App. 1981); *State v. Bowden*, 113 R.I. 649, 324 A.2d 631 (Sup. Ct. R.I. 1974); *People v. Witherspoon*, 26 Ill.2d 483, 190 N.E.2d 281 (Sup. Ct. Ill. 1963).

(2)

Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. :03-1666

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CHRISTOPHER SLAVIN,

Petitioner.

REPLY PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Counsel of Record
ROBERT J. DEL COL, ESQ.
Attorney for Petitioner
34 Dewey Street
Huntington, New York 11743
(631) 271-4684

DAVID BESSO, ESQ.
120 4th Avenue
Bayshore, New York 11706

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

TABLE OF CONTENTS

Pages

I. Respondent's Opposition Avoids The Genuine Questions 1

II Respondent's Questions Are Easily Dispatched 7

III. Conclusion 10

TABLE OF AUTHORITIES

Pages

Boyd v. U.S., 116 U.S. 616 (1865) 4

Braswell v. U.S., 487 U.S. 99 (1988) 4

Counselman v. Hitchcock, 142 U.S. 547 (1896) 3

Doe v. U.S., 487 U.S. 201 (1988) 4

Fisher v. U.S., 425 U.S. 391 (1976) 4

Miranda v. Arizona, 384 U.S. 436 (1966) 5

Pennsylvania v. Muniz, 486 U.S. 582 (1990) 6

People v. Kennedy, 32 N.Y. 141, 146 (1865) 8

People v. Razeziez, 206 N.Y. 249 (1912) 8, 9

Schmerber v. California, 384 U.S. 757 (1966) 3, 5, 6

Shapiro v. U.S., 335 U.S. 1(1947) 4

Tot v. U.S., 319 U.S.463 (1943) 8

Ullman v. U.S., 350 U.S. 422, 426-428 (1956) 4, 5

U.S. v. Doe, 465 U.S. 605 (1984) 4, 6

U.S. v. Hubbell, 530 U.S. 27 (2000) 10

I. Respondents Opposition Avoids The Genuine Questions

In opposing this Petition, the People meander far and wide in avoiding the central questions of constitutional law created by the true subject of this Petition, the New York Court of Appeals' decision which improperly blended the well defined corporeal evidence exception with the more elusive act of production doctrine. Also, by raising new, yet unimportant questions to the Court it becomes readily apparent that the State would much prefer to avoid the genuine controversy and remain unresponsive to the arguments and reasoning presented in the Petition as opposed to confronting, head-on, the real constitutional issues created by the lower Court. However, to dilute the significance of this Petition, by attempting the slight of hand maneuver that is Respondent's opposition, is distressing.[1] Nevertheless, this office will remain circumspect.

[1] The Petitioner, relying on Court rule 14(G) which expressly provides that only facts "*material to consideration of the questions*" be included, did not set forth a full recitation of the facts established at trial. The State, ignoring this rule, has submitted a lopsided and misleading statement of facts that should be ignored. For instance, the State discloses that complaining witness Isreal Perez testified that the wound inflicted to his wrist started bleeding "*immediately*", like a "*hose*". However, he also testified that, after emerging from the basement where the attack purportedly occurred, he fell to the pavement, struggled with his assailants (with his hands touching the pavement) crossed a roadway and entered into a wooded area. What the People hide from the Court in their exceedingly selective statement of facts is that no serological evidence whatsoever was found in the basement, on the ramp, the roadway and most importantly on his wristwatch, which was found some 100 feet from where the wound was allegedly inflicted. The only rational conclusion that can be drawn from this scientifically established fact is that witness Perez was not telling the truth. Instances like this are replete throughout the trial record and it is safe to say that each and every forensic and scientific expert called by the People contradicted the "*facts*" testified to by both complaining witnesses. Equally misleading is the People's statement that the treating physician's affirmative response to a theoretical question as to whether a "*person could die from a blow to head*". What Respondent intentionally omits is the question, posed on cross examination asking, could the complaining witness have died from "*this blow to the head*" which was answered with a simple "*no*". In context, and

There are however, certain, seemingly intentional, misstatements of fact and misapprehensions of law that are promulgated throughout the State's submission that must be rectified in order to clarify what is at issue.

For instance, Respondent fails to address the most important factual consideration: that communicative and testimonial evidence was extracted directly from the natural person of the accused by virtue of a coercive judicial edict that forced the Petitioner to strip and pose for a photographer. They were not routine "*arrest photographs*" nor were they relevant as "*real or physical evidence*" as the People frequently misrepresent. To repeatedly refer to these photos as "*arrest photos*" is intellectually disingenuous and more an exhibition of wishful thinking than an accurate telling to the Court. These photographs were taken pursuant to a coercive judicial edict that, while extorting communicative and testimonial evidence from the accused, simultaneously required him to actively participate in creating it, five months after his arrest. This Court should not be confused by the State's attempt to deflect Petitioner's claims: it was the photographs taken pursuant to the exemplar order, not those surreptitiously taken outside the presence of counsel at the time of surrender, that confronted Petitioner at trial. (Pet. App. 28a)

Most importantly, the Respondent, in its escapist view of things, ignores altogether the simple fact that the New York Court of Appeals' decision in question permits, even promotes, the forcible extraction of testimonial and communicative evidence by use of this Court's very limited corporeal evidence exception. The Respondent's entire thesis fails to recognize the distinction that is "*drawn under the Fifth Amendment's privilege against self incrimination as one between an accused's 'communications' ' in whatever form', vocal or*

---

in light of the many constitutional abuses imparted upon the Petitioner there is no harmless error analysis available to the People as is suggested by their opposition.

physical, and the compulsion which makes a suspect or accused the source of real of physical evidence..." U.S. v. Wade, 388 U.S. 218, 223 (1967) citing Schmerber v. California, *infra*. It is this Distinction, one that limits the state's ability to extract from the natural person evidence relevant to corporeal matters that constitutionally reconciles the corporeal evidence exception. It is not a mechanism constructed to compel an accused to "*speak his own guilt*". Wade at 223. For their departure from this well settled constitutional limitation on the gathering of evidence directly from one accused of a crime, neither the Court below nor the Respondent offer any pertinent authority or constitutionally authorized justification. Importantly, on this very issue the Respondent is eerily silent. What can be said is that the State's opposition demonstrates that the New York Court of Appeals has thrust New York into a significant constitutional controversy and that New York now stands alone amongst the States in its interpretation of the Fifth Amendment's self incrimination clause. This interpretive gap must now be closed. Counselman v. Hitchcock, 142 U.S. 547 (1896).

* * *

In opposing review the State also argues that having knowledge of Petitioner's tattoos enables it to coerce testimonial and communicative evidence from Petitioner and, this coerced extraction of testimonial and communicative evidence is constitutionally available by application of the corporeal evidence exception. Schmerber v. Californis, *infra*[2]. There is no support for this conclusion in any of the authority cited nor is the argument consistent with any previous interpretation of the Fifth Amendment's self-incrimination clause. Indeed, much of what is cited by Respondent

---

[2] It is important to note that Respondent, while making the claim that they "*knew*" of the tattoos, never discloses what they knew, how they knew it or fully describes to what extent they knew of the tattoos. This fact, noted by the Court below pertains to any discussion of "*derivative use*" see: U.S. v. Hubbell, 530 U.S. 27, 37, 38 (2000). Pet. App. 8A

recognizes the bright line that once separated corporeal from incorporeal evidence, a line now blurred beyond recognition by the New York Court of Appeals.

* * *

The Fifth Amendment's self incrimination clause has been described by this Court as "*an important advance in the development of our civilization and a privilege enacted by the founders who, while cognizant, and not naïve or disregardful of the interests of justice, made a judgment, and expressed it in our fundamental law*" that, "*to build up a criminal case in whole or in part, with the assistance of enforced disclosures by the accused*" is an evil to be avoided. Likewise, this Court has declared, "*If it be thought that the privilege is outmoded in the conditions of this modern age then the thing to do is to take it out of the Constitution, not whittle it down by subtle encroachments of judicial opinion*" Ullman v. U.S., 350 U.S. 422, 426-428 (1956). It is clear that the State's approach, one adopted by the New York Court of Appeals, constitutes a piecemeal erosion of the privilege and diminishes the privilege as it applies to the natural individual in ways never contemplated by this Court when it conceived the act of production doctrine in Boyd v. U.S., 116 U.S. 616 (1865) and revisited it in later document cases like *Shapiro v. U.S.*, 335 U.S. 1(1947); Fisher v. U.S., 425 U.S. 391 (1976); U.S. v. Doe, 465 U.S. 605 (1984); Doe v. U.S., 487 U.S. 201 (1988); Braswell v. U.S., 487 U.S. 99 (1988); and Hubbell, *supra*. Moreover, the Respondent's view of the corporeal evidence exception unleashes that doctrine into areas well beyond anything ever contemplated by this Court.

Equally unsettling is Respondent's position that knowledge of a "*previous statement*" (@ 25) purportedly made by an accused permits the use of force, even incarceration, to compel him to restate, repeat or affirm those statements. (@ 29) To ignore entirely the historical genesis and defined scope of the privilege and the "*complex values it helps to protect*" by a

strained and inappropriate application of the act of production doctrine and the corporeal evidence exception only serves to undermine "*the constitutional foundation underlying the privilege*" which is to guarantee "*the respect a government, state or federal...must accord to the dignity and integrity of its citizens. To shoulder the entire load...to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors rather than the cruel, simple expedient of compelling it from his own mouth*" Schmerber v. California, 384 U.S. 757, 762 (1966); citing Miranda v. Arizona, 384 U.S. 436, 460 (1966). Accepting Respondent's approach cuts the privilege to its root and embraces the proposition that the State, once possessed of information that an accused expressed an opinion or thought, even years before the commission of a crime, can now physically force him to restate, repeat or affirm that belief in open court and his refusal being met with jail. This is exactly the type of inquisitorial prosecution profoundly rejected by the framers. A precedent like the one advanced by Respondent and set by the New York Court of Appeals sponsors draconian measures to obtain incriminating testimonial and communicative evidence directly from one accused of a crime and impermissibly degrades the privilege. This flatly contradicts the framers' intentions when they included the privilege in the Bill of Rights, for it was they who "*had the most experience with a tendency in human nature to abuse power*" and therefore "*sought to close the doors against like future abuses by law enforcing agencies*" Ullman v. U.S., 350 U.S. 422, 428 (1956). There is no view of the facts relating to the Trial Court's order which compelled this Petitioner to assist in the creation of evidence, evidence that was clearly communicative and testimonial, not real or physical, that avoids the conclusion that the Petitioners Fifth Amendment privilege was transgressed. This is so whether

viewed in the context of *Schmerber's* corporeal evidence exception or *Hubbell's* act of production doctrine.

* * *

While the privilege has been susceptible to expansion and contraction there is no escaping that it was designed to "*protect the accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature*" and that testimonial evidence is found when an accused's communication "*explicitly or implicitly*" relates a factual assertion or discloses information. With this in mind, and remembering the nature of the evidence coerced from Petitioner, the Respondent's belief that the privilege is not "*implicated*" defies constitutional explanation. Here, the view expressed by the state and the lower Court, dispenses with both considerations while their implausible view of the privilege leap-frogs between corporeal and incorporeal evidence in a way never contemplated by the framers or this Court. *Pennsylvania v. Muniz*, 486 U.S. 582 (1990); *Doe v. U.S.*, 487 U.S. 201, 210 (1988); *U.S. v. White*, 322 U.S. 694 (1944). Like the Court of Appeals, it is only by combining strained, narrow readings with unsound logic that Respondent can safely arrive at its destination.

Respondent's view obliterates altogether the historical distinction between the person of the accused and his papers and effects. Now, at least in New York, expressing a thought (as *Schmerber* puts it, "*in whatever form*") entitles the State to menace or coerce directly from the accused a repetition or affirmance of a previously held point of view or expressed thought. According to Respondent, and the lower Court, an accused could now be forced to repeat words (uttered years earlier) in open Court and his refusal to do so could be met with coerced extraction. Their position, I suspect, would not be met with favor by the founding fathers.

It is respectfully submitted that this case presents a critical mass of convergent forces with the State, and its insatiable desire to obtain incriminating testimonial and

communicative evidence, irrespective of its source, and the accused seeking to preserve inviolate his individual liberties being at odds with one another.

That is why this case is so very important.

II. Respondent's Questions Are Easily Dispatched

Insofar as Respondent's counter-questions to the Court, Petitioner asserts that since they are, for the most part, inconsequential to the important constitutional controversy created by the decision below, the questions can, and should, be dispatched with relative ease.

The Respondent posed five questions to the Court and Petitioner responds *in seriatum*.

First, while the lower Court's decision may have some chilling effect on what words citizens choose to affix to their body, neither Petitioner nor the Court of Appeals considered or raised this question. Accordingly, the question, although interesting, is tangential to the proper consideration of this matter.

Regarding Respondent's second question Petitioner, rejects the premise of the question. The photographs in dispute were taken pursuant to a court order relying on the corporeal evidence exception despite the evidence being utterly irrelevant and immaterial for such a purpose. Moreover, there does not exist a more extensive invasion of personal privacy than to be stripped naked and repeatedly photographed.[3] As for the Fourth Amendment analysis suggested by this question, the Petitioner defers to the Fourth Amendment discussion in his Petition.

In answer to Respondent's third question it is submitted that despite a rather convoluted approach to placing importance

---

[3] Contradicting Respondent's contention *vis a vis* routine booking is the fact that twice before stripping the accused the prosecutrix asked permission of defense counsel and was twice rejected. Moreover, this search, conducted two hours after surrender, was not performed by the police but rather the prosecutrix and others employed by the District Attorney. The argument supplied by Respondent in answer in their own question is specious.

on the tattoos as "*statements*"(conceding their communicative value and testimonial nature) Respondent's argument provides compelling support for Petitioner's trial contention that there is no theory available to the State that permits the introduction of this evidence. If it is assumed *arguendo* that a tattoo is a "*statement made contemporaneous with its application*" (Respondent's brief @ 25) how then can a statement made seven (7) or even ten (10) years prior to the crime date, not be considered temporally remote and therefor irrelevant. Likewise, they (the tattoos) are also "*logically remote*" and as such are irrelevant. *Tot v. U.S.*, 319 U.S.463 (1943).

By conceding the images in question are communicative and testimonial statements, the Respondent, aside from squarely implicating Petitioner's Fifth Amendment privilege and Sixth Amendment right to counsel, has subjected itself to Petitioner's "*inference within an inference*" reasoning raised at trial and rejected by the Court below. (Pet App.5a, 9a)[4] *U.S. v. Ross, infra.*

The logical analysis advanced by Petitioner at trial, closely follows ancient law and legal theory that dates as far back as the mid-1800's when, by Chief Judge Denio in *People v. Kennedy*, 32 N.Y. 141, 146 (1865), the New York Court of Appeals held that "*circumstantial evidence, I repeat, consists in reasoning from facts that are known or proved, to establish such as are conjectured to exist, but the process is fatally vicious if the circumstances from which we seek to deduce the conclusion depends itself upon conjecture*" (emphasis added) *id* at 145-146.

In *People v. Razeziez,* 206 N.Y.249, 270 (1912), the New York Court of Appeals, borrowing from this Court in *U.S. v. Ross*, 92 U.S. 281, noted that "*they are inferences from*

---

[4] New York, like the Federal Courts, has adopted the "*inference within an inference*" rule *vis a vis* circumstantial evidence. *U.S. v. Romano*, 382 U.S. 136 (1965).

inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at conclusions of fact is generally, if not universally inadmissible. No inference of fact or law is reliable, drawn from premises, which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed...it is upon this principle that Courts are daily called upon to exclude evidence as too remote for the consideration of a jury". Therefor, the Respondent's question insofar as relevancy is concerned should be answered in the negative.[5] According to *Ross*, which has been adopted in New York by *Razeziez*, the photos should have been excluded as irrelevant. Quite simply, in order to arrive at the conclusion that the tattoos are relevant, three separate and distinct inferences must be made. First, one must infer that the motive behind being tattooed was, to the exclusion of all other explanations, the self -identification with white supremacist ideology as opposed to say gang membership, peer pressure, drunkenness or even a temporary and passing fascination with an outlaw counter culture[6]. One must then infer that the ideology, one assigned by the People, somehow provides motive and intent for a crime that occurred at least five years later. One is then asked, by yet a third inference, to assume that Petitioner still subscribes to the purported beliefs that form the basis of the first inference. This "*inference within an inference*" scenario renders the conclusion that the tattoos demonstrate motive and intent pure speculation and, as a result thereof, the evidence is irrelevant *U.S. v. Ross*, 92 U.S. 281 (1875).

Concerning Respondent's fourth question, Petitioner asserts that the use of an expert to disclose to the jury what

[5] It should be noted that throughout the State's submission the terms "motive" and "intent" are used interchangeably. This, I submit is a dangerous proposition.

[6] On point is that the State's own expert testified as to reasons other than those attributed to the Petitioner for the existence of these tattoos. Pet. App. 56a-64a.

Petitioner thinks and believes is as repugnant as it is unreliable. Moreover, to use this evidence to connect an accused to entities and organizations that are utterly irrelevant to the proceeding is reprehensible. By projecting the photos on an 8 x 10 foot movie screen and permitting law enforcement the opportunity to attribute actual words to an accused is well beyond the pale of legitimate expert testimony. Moreover, as seen in the discussion of Respondents question "2" the evidence in question has little or no probative value and exceedingly devastating prejudice. Finally, by application of this Courts "*derivative use*" corollary the evidence should have been excluded. U.S. v. Hubbell, 530 U.S. 27, 37, 38 (2000).

Any review of the experts testimony unmistakably demonstrates the inappropriate linking of Petitioner to such entities as "*prison gangs*", "*street gangs*", "*white supremacy*", "*outlaw motorcycle gangs*" and "*skinhead gangs*" all without any factual basis whatsoever. To objectively conclude that the probative value of this evidence outweighed its prejudice (since none of these entities were, as a matter of record, even theoretically relevant to the proceeding) overlooks the facts of the case.

Finally, the Petitioner's reply to Respondent's question five is fully set forth in the Petition and herein. However, Respondent's assertion that the photos, being of Petitioner, did not serve as a self authentication is myopic.[7]

Conclusion

For these reasons and those previously presented the Petition for a Writ of Certiorari.

Respectfully Submitted,
ROBERT J. DEL COL, ESQ.

---

[7] A further illustration of this point can be found when, as early as Petitioners arraignment the prosecutrix maintained bias as a motive then states... "*The evidence of that is going to come directly from, among others ,Christopher Slavin who is covered by tattoos that indicate a racial motive.*"